No. ____

IN THE

Supreme Court of the United States

In Re: ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
and W. R. HUFF ASSET MANAGEMENT CO., L.L.C.,

Petitioners,

—against—

ADELPHIA COMMUNICATIONS CORPORATION AND ITS AFFILIATED DEBTORS AND DEBTORS-IN-POSSESSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether in an appeal that presents a substantial issue of federal law and over which there is indisputably statutory and constitutional appellate jurisdiction, the Second Circuit was correct in dismissing the appeal in reliance on a court-created doctrine called "equitable mootness" using a standard derived from the Second Circuit's decisions in *In re Chateaugay Corp. [I]*, 988 F.2d 322 (2d Cir. 1993), and *In re Chateaugay Corp. [II]*, 10 F.3d 94 (2d Cir. 1993), which standard is in conflict with one "equitable mootness" standard in the First, Fifth, Seventh, and Ninth Circuits,* and another standard in the Eleventh and D.C. Circuits,** and which doctrine has never been reviewed by this Court?

Whether in an appeal from decisions of the bankruptcy court and district court approving a settlement among the Debtors, the United States Department of Justice, the Securities and Exchange Commission, and others, the Second Circuit correctly refused to review the legality of a distribution of estate assets to stockholders prior to full payment to all unsecured creditors in direct violation of the exclusive distribution scheme established by the Bankruptcy Code and the Absolute Priority Rule on the grounds that the appeal was equitably moot, even though the law and the equities favored the relief the Petitioners sought and there was an available remedy on the appeal?

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* *See In re Public Serv. Co. of New Hampshire*, 963 F.2d 469 (1st Cir. 1992); *In re GWI PCS 1, Inc.*, 230 F.3d 788 (5th Cir. 2000); *In re UNR Indus.*, 20 F.3d 766 (7th Cir. 1994); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981).

** *See In re Club Assocs.*, 956 F.2d 1065 (11th Cir. 1992); *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986).

PARTIES TO THE PROCEEDING BEFORE THE COURT OF APPEALS

Appellants-Cross-Appellees

Official Committee of Unsecured Creditors of Adelphia Communications Corporation

W.R. Huff Asset Management Co., L.L.C.

Ad Hoc Adelphia Trade Claims Committee

U.S. Bank National Association, as Indenture Trustee

Debtors-Appellee

Adelphia Communications Corporation and its affiliated Debtors and Debtors-in-Possession

*Appellees**

Bank of America, N.A.

Bank of Montreal

Wachovia Bank, National Association

*Appellee-Cross-Appellant**

Official Committee of Equity Security Holders of Adelphia Communications Corporation

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* These parties were parties before the Second Circuit Court of Appeals solely with respect to a cross-appeal by the Official Committee of Equity Security Holders concerning issues that are not subject of this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for Petitioner W.R. Huff Asset Management Co., L.L.C. ("Huff") (a private, non-governmental party) certifies that Huff has no parent corporation and that no publicly held corporation owns 10% or more of Huff.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	11
Introduction	11
I. There Is A Circuit Conflict On The Legal Standard For Determining Whether An Appeal From A Bankruptcy Court's Approval Of A Settlement Or Plan Of Reorganization Should Be Dismissed On The Grounds Of Equitable Mootness	15
II. Even Under The Second Circuit's Standard Of Equitable Mootness, The Court Of Appeals Should Have Fashioned The Relief Sought By Petitioners Because The Equities Weighed In Favor Of Such Relief	25
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: PAGE

Bank of Am. Nat'l Trust Savings Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) 27

Begier v. IRS, 496 U.S. 53 (1990) 26

Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939) 27

Central States S.E. & S.W. Areas Pension Fund v. Central Transport, Inc., 841 F.2d 92 (4th Cir. 1988) 16

Church of Scientology v. United States, 506 U.S. 9 (1992) 15

Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976) 15, 18, 23

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 26

In re AOV Indus., 792 F.2d 1140 (D.C. Cir. 1986) 13, 17, 22, 24

In re AWECO, Inc., 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S. 880 (1984) 28

In re Chateaugay Corp. [I], 988 F.2d 322 (2d Cir. 1993) 10, 11, 16, 17

In re Chateaugay Corp. [II], 10 F.3d 944 (2d Cir. 1993) 10, 11, 16, 17

In re Club Assocs., 956 F.2d 1065 (11th Cir. 1992) 17, 22, 23

PAGE

In re Continental Airlines, 91 F.3d 553 (3d Cir. 1996) *cert. denied*, 519 U.S. 1057 (1997) 12, 16, 17, 21, 23, 24

In re Envirodyne Indus., 29 F.3d 301 (7th Cir. 1994) 21

In re Fin'l News Network Inc., 980 F.2d 165 (2d Cir. 1992) 29

In re Focus Media, Inc., 378 F.3d 916 (9th Cir. 2004), *cert. denied*, 544 U.S. 968 19

In re Granite Partners, 208 B.R. 332 (Bankr. S.D.N.Y. 1997) 27

In re GWI PCS 1 Inc., 230 F.3d 788 (5th Cir. 2000) 16, 19

In re Int'l Environmental Dynamics, Inc., 718 F.2d 322 (9th Cir. 1983) 19

In re Iridium Operating LLC, 478 F.3d 452 (2d Cir. 2007) 10, 28

In re PCH Assocs., 804 F.2d 193 (2d Cir. 1986) .. 29

In re Public Serv. Co. of New Hampshire, 963 F.2d 469 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992) 16, 20

In re PWS Holding Corp., 228 F.3d 224 (3d Cir. 2000) 18

In re Roberts Farms, Inc., 652 F.2d 793 (9th Cir. 1981) 16, 19, 21

In re Stirling Homex Corp., 579 F.2d 206 (2d Cir. 1978) 27

PAGE

In re UNR Indus., 20 F.3d 766 (7th Cir.), *cert. denied*, 513 U.S. 999 (1994) 12, 16, 19

In re Zenith Elec. Corp., 329 F.3d 338 (3d Cir. 2003) 18

Katchen v. Landy, 382 U.S. 323 (1966) 26

Mills v. Green, 159 U.S. 651 (1895) 15, 23

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) 26

Pepper v. Litton, 308 U.S. 295 (1939) 26

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414 (1968) 28

SEC v. American Trailer Rentals, 379 U.S. 594 (1965) 28

Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646 (2d Cir. 1997) 29

Rules and Statutes:

11 U.S.C. § 105 26

11 U.S.C. § 365 26

11 U.S.C. § 502(b)(6) 29

11 U.S.C. § 507 27

11 U.S.C. § 510(b) 27

11 U.S.C. § 726(a)(4) 29

11 U.S.C. § 1129 ..... 8, 27, 28

21 U.S.C. § 853 6

PAGE

28 U.S.C. § 158(a)(1) 7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 8

28 U.S.C. § 1334(e) 26

Federal Bankruptcy Rule 9019 ..... 5, 6, 7

Other Authorities:

Elizabeth Warren, 54 U. Chi. L. Rev. 775 27

H. R. Rep. No. 95-595 (1977) 26

H.R. Doc. No. 93-137, Part I (1973) 26

4 Lawrence P. King, et al., *Collier on Bankruptcy*, App. Pt. 4(c) (15th Ed. Rev. 2006) 26

Thomas D. Crandall et al., *The Law of Debtors and Creditors* § 10 (2002) 25-26

S. Rep. No. 95-989 (1978) 29

Petitioners, the Official Committee of Unsecured Creditors of Adelphia Communications Corporation and W.R. Huff Asset Management Co., L.L.C., respectfully request that writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit in *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Communications Corp.*, 2d Cir. Nos. 06-1417-BK LEAD, 06-1738-BK XAP (Dec. 26, 2006).

OPINIONS BELOW

The judgment of the Court of Appeals in this case is not reported and is annexed hereto. (App. 1a.)[1] The Court of Appeals denied petitions for rehearing and rehearing *en banc* in an unreported order. (App. 5a.) The opinion and order of the United States District Court for the Southern District of New York that was appealed to the Second Circuit is reported at 337 B.R. 475 (S.D.N.Y. 2006). (App. 7a.) The decisions and orders of the United States Bankruptcy Court for the Southern District of New York that were appealed to the District Court are reported at 327 B.R. 143 (Bankr. S.D.N.Y. 2005) and 327 B.R. 175 (Bankr. S.D.N.Y. 2005), respectively. (App. 15a and 93a.)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 26, 2006. Timely petitions for rehearing and rehearing *en banc* were denied on February 27, 2007. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

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[1] Throughout this Petition, reference to the decisions, orders and statutes that are appended hereto shall be in the form "App. _a", and reference to the documents and other evidence submitted by the parties in a Joint Appendix to the Court of Appeals shall be in the form "JA-__".

STATEMENT OF THE CASE

This case arises out of a challenge by virtually all of the unsecured creditors of the bankruptcy estates of Adelphia Communications Corporation ("Adelphia") and its subsidiaries (collectively with Adelphia, the "Debtors")—including the Official Committee of Unsecured Creditors—to the legality of Adelphia's settlement of purported claims by the United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"; collectively, the "Government"). Petitioners challenge that aspect of the settlement that permits the DOJ to distribute $715 million in estate assets the Government received under the settlement to the Debtors' statutorily subordinated shareholders prior to payment in full of the Debtors' unsecured creditors. All parties to this case agree that such payment by the Government, if made directly by the Debtors rather than through the Government conduit, violates the exclusive distribution scheme and payment priorities in Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"), which embodies the fundamental market principle that debt is repaid before equity. Notwithstanding the absence of a dispute among the parties concerning the illegality of the Government's intended—but yet to be made—payment to statutorily subordinated shareholders, the Court of Appeals refused to exercise its indisputable jurisdiction to address this issue, and instead dismissed the appeal based on an application of the court-created doctrine of equitable mootness.

Prior to its recent liquidation, Adelphia was the fifth largest operator of cable systems in the United States. On June 25, 2002, the Debtors filed voluntary petitions for relief under the Bankruptcy Code. (JA-504.) The Debtors' bankruptcies were the direct result of one of the largest frauds in American corporate history. From at least 1999 through March 2002, John Rigas, the President and Chief Executive Officer of Adelphia, his sons Timothy and Michael Rigas, who were also Adelphia executives, along

with other Adelphia insiders, looted over $3 billion from the Debtors for their personal enrichment and with no benefit to the Debtors. The primary vehicles for the Rigases' fraud were privately owned companies ("Rigas Managed Entities" or "RMEs"), that drew down the entire amount—nearly $5 billion—available under various credit facilities, with corporate Debtors owned by Adelphia being directly liable for repayment of all amounts.

On March 27, 2002, the Debtors disclosed that approximately $2.5 billion in debt under the credit facilities—reflecting amounts drawn by the RMEs—had been omitted from Adelphia's public filings. (JA-15.) Thereafter, the Debtors defaulted under the terms of their debt instruments, the value of the securities issued by Adelphia and certain of its subsidiaries plummeted, and governmental agencies commenced investigations into the Rigases' conduct. (JA-15-16.) In May 2002, the Debtors forced John, Timothy and Michael Rigas to resign their various officer and director positions. (JA-293-94, 1116-18.) As of the Petition Date, the Debtors owed approximately $6.8 billion in principal amount of senior secured debt, and owed over $9 billion to their bondholders.

On September 23, 2002, John, Timothy and Michael Rigas (the "Rigas Defendants") were indicted on charges relating to the fraud they perpetrated on the Debtors and the Debtors' unsecured creditors (the "Criminal Action"). (JA-16, 504.) The indictment detailed the extent to which the Rigas Defendants used the RMEs to loot the Debtors and sought, among other things, the forfeiture of not less than $2.5 billion of the proceeds of their criminal conduct, including forfeiture of the RMEs. *Id.*[2] John and Timothy Rigas were convicted of fraud. (JA-17, 505.)

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[2] Prior to the indictment, a grand jury spent approximately two months investigating the Rigas Defendants. (JA-504.) The grand jury did not indict the Debtors, and there were no allegations in the indictment that the Debtors knew of, or participated in, the Rigas Defendants'

On July 24, 2002, the SEC filed a civil enforcement action against Adelphia—but none of the other Debtors—and certain Rigas family members (the "SEC Action"). (JA-18-19, 505.) Like the DOJ, the SEC alleged in its complaint the extent to which the Rigases looted the Debtors through, among other things, the RMEs. In its action, the SEC sought an undisclosed amount of penalties and disgorgement from Adelphia to compensate victims of the Rigases' securities fraud. (JA-296-97, 988.)[3]

Also on July 24, 2002, Adelphia initiated an action against certain Rigas family members and RMEs seeking to recover the billions of dollars that the Rigases looted from the Debtors (the "Rigas Adversary Proceeding"). (JA-20, 505.) In its complaint, Adelphia alleged that the defendants held the billions of dollars and the RMEs that they looted from the Debtors in a constructive trust for Adelphia's benefit (the "Constructive Trust Claim"). (*Id.*)[4]

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criminal activity. (JA-504, 16.) The Debtors actively assisted the DOJ in its investigation and prosecution of the Rigases, providing the DOJ with evidence supporting the charges against the Rigas Defendants and their accomplices. (JA-636-7, 18, 544-56, 274.) At trial, the DOJ proved—relying upon, among other things, significant testimony from the Debtors—that the Rigas Defendants and their accomplices concealed their misconduct from the Debtors, and that the Debtors were innocent victims of this massive fraud. (JA-544-56, 268.)

[3] Although filed in 2002, the SEC Action was stayed pending the Criminal Action, and the SEC never obtained any rulings concerning the validity or viability of its claims. (JA-19.) On July 14, 2004, the Creditors Committee initiated an adversary proceeding against the SEC seeking to subordinate the payment of any amounts in the SEC Action to the payment of those parties who have priority pursuant to the Bankruptcy Code. (JA-19; JA-505.)

[4] On July 6, 2003, the Creditors Committee and the Debtors initiated an action against, among other parties, the lenders participating in the credit facilities (the "Bank Litigation"). (JA-506.) Plaintiffs allege that the agent banks on those facilities and their affiliated investment banks aided and abetted the Rigases in defrauding the Debtors by, among other things, structuring and funding the facilities to allow the

In or about June 2004, Adelphia's new Board of Directors began negotiations with the Government to attempt to settle claims that the DOJ and SEC believed they could assert or already had filed against the Debtors. (JA-287, 397.) The Government demanded that Adelphia pay the historically unprecedented amount of $1 billion.

Over the next ten months, the Debtors repeatedly attempted to engage the Government in negotiations. (JA-243-45.) The Debtors made presentations demonstrating, among other things, that the Government's $1 billion demand was historically unprecedented; the DOJ's own internal guidelines—the Thompson Factors—weighed heavily against the indictment that the Government continued to threaten; and the Debtors had a superior claim to the RMEs over which the Government threatened forfeiture. (JA-289-92, 397-403, 487, 694.) Adelphia's representatives emphasized that payments from any restitution fund should be made in accordance with the distribution scheme established by the Bankruptcy Code. (JA-298, 236.) Although the Government ultimately reduced its demand to $715 million, it insisted that it have complete discretion to disburse restitution funds in any manner it saw fit and expressly communicated its intention to distribute funds to stockholders who would otherwise be subordinated to the unsecured creditors. (JA-294-50, 404.)

Notwithstanding their opposition to the terms of the proposed settlement and the Government's intent to distribute the proceeds in violation of the Bankruptcy Code, the Debtors agreed to the settlement in April 2005. (JA-307-310.) On April 28, 2005, the Debtors moved pursuant to Rule 9019 of the Federal Bankruptcy Rules (the "Rule 9019

Rigases to loot the Debtors. (*Id.*) The Official Committee of Equity Security Holders intervened in the Bank Litigation to join in many of plaintiffs' claims and to assert additional claims against the lenders, including claims for fraud and violation of federal RICO statutes. On August 30, 2005, the Bankruptcy Court granted the Creditors Committee and the Equity Committee standing to proceed with the Bank Litigation.

Motion") for approval of the settlement (the "Settlement"). (JA-11.)

The Settlement resolves, among other things, the Criminal Action, the SEC Action, and much of the Rigas Adversary Proceeding. (*Id.*) The following provisions of the Settlement are relevant to this case:

> 1. The Debtors agreed to pay $715 million in value to the Government in exchange for the Government's agreement not to attempt to prosecute the Debtors for the crimes committed by the Rigas Defendants and the SEC's consent to the entry of a judgment in the SEC Action without the award of penalties or disgorgement against the Debtors. (JA-337.)
>
> 2. The Government is entitled to use the Debtors' payment to establish a victims' restitution fund (the "Restitution Fund") that the Government will distribute to victims of the Rigases' fraud. (*Id.*)[5]
>
> 3. The Debtors received title to certain RMEs—that were funded with the Debtors' looted assets—that the Rigases had forfeited to the Government. (JA-59-60.)

Petitioners and numerous other parties objected to the Rule 9019 Motion, arguing that, among other things, the Settlement was not fair and equitable or in the best interests of the Debtors' estates because it permitted the Government to distribute estate assets to subordinated shareholders ahead of unsecured creditors and was the result of overreaching by the Government. (JA-501, 807.)

On May 20, 2005, the Bankruptcy Court held a hearing on the Rule 9019 Motion. The undisputed evidence proved

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[5] The Restitution Fund is to be administered as a forfeiture fund pursuant to 21 U.S.C. § 853. (JA-983.) The Government intends to appoint a private individual to "administer" the Restitution Fund, who will then attempt to identify "victims" and distribute funds to those victims in his or her sole discretion. (JA-59, 250, 983, 486-87.)

that Adelphia's Board did not support the terms of the Settlement. Indeed, the testimony made clear that the Debtors believed—and still believe—that the Settlement terms are unreasonable, "extortionate," "excessive," and the result of a "shakedown," and that the Debtors agreed to the Government's terms for fear of the "Sword of Damocles" being wielded in the form of a potential indictment and forfeiture of the RMEs. (JA-242-43, 248, 269, 308, 310.) The Government did not present any evidence or argument at the Rule 9019 Hearing.

The Bankruptcy Court approved the Settlement in a Bench Decision (App. 15a) and an Order (App. 78a) dated May 20, 2005 and May 26, 2005, respectively. The Bankruptcy Court acknowledged the Government's intent to distribute the Restitution Fund to subordinated stockholders (App. 62a-67a), but ruled that, because the issue of whether that distribution—when made by the Government and not the Debtors—violates the Bankruptcy Code was an "unsettled" area of law that was a "close call," it was reasonable for the Debtors to resolve the issue by agreeing to permit the Government to distribute the Settlement proceeds in such a manner (App. 64a). The Bankruptcy Court further ruled that it was reasonable for the Debtors to accede to the Government's threats of indictment and forfeiture even if those threats were not legitimate. (App. 59a-60a.)[6]

On May 27 and 31, 2005, Petitioners appealed the Bankruptcy Court's approval of the Settlement. The District Court had jurisdiction to entertain the appeal pursuant to 28 U.S.C. § 158(a)(1). On February 23, 2006, the District Court affirmed "substantially for the reasons given by Judge Gerber." (App. 10a.) In doing so, the court concluded that the

[6] The day after the Bankruptcy Court granted the Rule 9019 Motion, the DOJ conceded to the Court of Appeals in a related matter that the Constructive Trust claim gave the Debtors a superior and indefeasible right to the RMEs that the Government was threatening to seize. (JA-1699-1701, 1748-49.)

Absolute Priority Rule, as embodied in Section 1129 of the Bankruptcy Code, was not applicable to the distribution of the Settlement funds because "any payments from the restitution fund would be from 'a fund to be created and owned by the Government,' not a distribution of assets of the debtors' estates as part of a plan of reorganization." (App. 13a (quoting the Bench Decision).) The District Court also noted—we believe incorrectly—that "if Adelphia had rejected the government's proposal and the government succeeded in forfeiting its assets, the government's interest in the assets would have been superior to those of the creditors in any case." (*Id.*) Finally, the District Court observed that although Petitioners' complaint about the distribution of estate assets in violation of the Bankruptcy Code's distribution scheme was "understandable," the issue supposedly was one for Congress—and not the courts—to resolve. (*Id.*)

On March 23, 2006, Petitioners appealed the District Court's Order. (JA-1852.) Petitioners asserted that the Settlement impermissibly violated the Absolute Priority Rule and the exclusive distribution scheme in the Bankruptcy Code, and infringed upon the judiciary's exclusive province to marshal and equitably distribute debtors' assets. The only relief Petitioners sought was a requirement that the Government distribute the Restitution Fund consistent with the Bankruptcy Code. The Court of Appeals had jurisdiction to entertain the appeal pursuant to 28 U.S.C. § 1291.

On or about May 26, 2006, the Debtors moved pursuant to section 363 of the Bankruptcy Code to sell substantially all their assets to Time Warner NY Cable and Comcast Corporation for $12.7 billion in cash and stock.[7] It is undisputed that the total consideration the Debtors will receive from Time Warner and Comcast is grossly insufficient to provide

[7] Petitioners did not seek a stay of the sale to Time Warner and Comcast because the relief they sought from the Court of Appeals solely involved the Government's distribution of a payment it had yet to receive (and still has yet to distribute).

any distribution to Adelphia's equity security holders under normal bankruptcy priorities.

On or about June 27, 2006, the Bankruptcy Court approved the sale to Time Warner and Comcast (the "Sale Order"). The Sale Order makes no reference to the Settlement or any distributions from the Restitution Fund. The sale closed on or about July 31, 2006. In accordance with the Rule 9019 Order, certain RMEs that were forfeited to the Government were conveyed to Adelphia, which conveyed those assets to the purchasers at the closing. Although the Government and the purchasers were on notice of Petitioners' appeal of the Settlement, neither required that the appeal be dismissed as a condition to the conveyances.

The Debtors moved shortly after the closing to dismiss Petitioners' appeal as equitably moot because Petitioners had not sought a stay of the Sale Order. In response, Petitioners asserted that their appeal was not equitably moot because the courts still could fashion the only relief Petitioners sought—an order requiring the Government to distribute the Restitution Fund in accordance with the priorities established by the Bankruptcy Code—without undoing the Sale Order, and because the Government had yet to distribute, or even receive, any funds pursuant to the Settlement. Moreover, Petitioners asserted that the Government could not be prejudiced by the relief Petitioners sought because the Government did not have a right to distribute the Restitution Fund in an illegal manner.

In response to an invitation from the Court of Appeals, each of the DOJ and the SEC filed an amicus brief. They asserted—for the first time in these proceedings—that the Government would not have entered the Settlement if it did not have absolute discretion to disburse the Restitution Fund in any manner it saw fit, including in violation of the Absolute Priority Rule.

On December 26, 2006, the Court of Appeals dismissed Petitioners' appeal on the grounds of equitable mootness.

(App. 1a.) The court, relying upon *In re Chateaugay Corp. [I]*, 988 F.2d 322, 325 (2d Cir. 1993), and *In re Chateaugay Corp. [II]*, 10 F.3d 944, 949-50 (2d Cir. 1993), ruled that because Petitioners did not seek a stay before the Government had performed its Settlement obligations in connection with the Sale Order, Petitioners were required to demonstrate that the relief they sought—that the Government distribute the Restitution Fund in accordance with the priorities under the Bankruptcy Code—would not create inequitable results. (App. 3a-4a.) The court concluded that it would be "grossly inequitable" to require the Government to comply with the priorities in the Bankruptcy Code because the Government—and only the Government—would be denied the benefit of its bargain if such a requirement were imposed. (App. 4a.) The court based its conclusion on the Government's argument in its briefs that it believed it had legitimate grounds for indicting and obtaining forfeiture over Adelphia, but declined to pursue those actions in exchange for the creation of a restitution fund to compensate defrauded investors. (App. 3a-4a.) Finally, the Court of Appeals refused to consider the significant merits of Petitioners' appeal—namely, the importance of ensuring compliance with the Absolute Priority Rule—in connection with its application of equitable mootness. (App. 4a.)[8]

On January 5, 2007, the Bankruptcy Court confirmed the Debtors' plan of reorganization, which incorporates the Settlement. It is undisputed that unsecured creditors will be paid under the plan at least $1 billion less than the amount of their claims. It is also undisputed that the Government, which has received a significant portion—but not all—of

[8] Two months after dismissing Petitioners' appeal, the Second Circuit held in another case that settlements under Bankruptcy Rule 9019 must comply with the Absolute Priority Rule and that whether a proposed settlement complies with the priorities in the Bankruptcy Code is the most important factor—and in most cases, the dispositive factor—in determining whether a settlement can be approved. *See In re Iridium Operating LLC*, 478 F.3d 452, 455 (2d Cir. 2007).

the payment under the Settlement, has not yet distributed any amounts but has stated that it intends to distribute the $715 million it receives from the Debtors' estates to equity security holders who otherwise would not be entitled to any payment under statutory priorities.

On February 27, 2007, the Court of Appeals denied the petition for rehearing and rehearing en banc. (App. 5a.)

REASONS FOR GRANTING THE WRIT

Introduction

This case presents two issues, each of which independently calls for this Court's consideration.

First, the Second Circuit Court of Appeals had statutory and constitutional jurisdiction in this appeal over what it acknowledged were important issues of federal law, but nonetheless dismissed the appeal based on its unique formulation of a doctrine that has come to be known as "equitable mootness." That doctrine is intended to foster reliance on the finality of substantially consummated settlements and plans of reorganization in bankruptcy—a principle with which Petitioners do not quarrel—but it has been crafted in decisions from nearly all of the Circuit Courts of Appeals that conflict with one another. This conflict among the Circuit Courts of Appeals has had the contrary effect of eliminating certainty as to when and whether an appellate court will exercise its jurisdiction to hear an appeal. This Court has never ruled on the right of an appellate court to decline to hear a bankruptcy appeal over which it unquestionably has jurisdiction on these grounds and, therefore, has not had an opportunity to bring uniformity among the differing standards in the various Circuits.

The decision below relied on standards set forth in two earlier Second Circuit decisions, *Chateaugay I*, 988 F.2d 322 (2d Cir. 1993), and *Chateaugay II*, 10 F.3d 944 (2d Cir.

1993), which together held that where a settlement or a plan of reorganization has been "substantially consummated" before an appeal can be heard, there is a presumption that it should be deemed final and unappealable. In order to rebut this presumption of "equitable mootness" under the Second Circuit's standard, the appellant has the burden to establish (as discussed more fully in Part I of this Petition) that the appellant acted diligently to stay the order below and that it would not be inequitable for the court to fashion some effective relief. This rebuttable presumption differs from the standards for equitable mootness in each of the other circuit courts that has adopted the doctrine. The conflict among the circuits has brought uncertainty to debtors and creditors as to whether and when settlements or plans of reorganization will be immune from review.

Indeed, the Seventh Circuit has acknowledged that the term "equitable mootness" is misleading because "[t]here is a big difference between inability to alter the outcome (real mootness) and unwillingness to alter the outcome ('equitable mootness'). Using one word for two different concepts breeds confusion." *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, 513 U.S. 999 (1994). This "confusion" was later acknowledged by the Third Circuit when it adopted its own version of equitable mootness, in an *en banc* decision, on a vote of seven to six, in which the majority surveyed versions of the doctrine among the circuits before crafting its own test, and the dissent opined that the new test was not "consistent with the law of all of the circuits that the majority claims to be following." *In re Continental Airlines*, 91 F.3d 553, 568 (3d Cir. 1996) (Alito, J., dissenting), *cert. denied*, 519 U.S. 1057 (1997). No circuit other than the Second Circuit uses the rebuttable presumption structure that shifts the burden to the appellant to demonstrate that it would not be inequitable to dismiss the appeal.

While the importance of finality following substantial consummation of a settlement or plan of reorganization in

bankruptcy is beyond debate, finality should not be sanctified such that it prevents appellate courts from determining whether the underlying legal issue deserves consideration. Nor should finality permit appellate courts to avoid determining whether efforts should be made to implement relief that satisfies both the legal and equitable rights of the affected parties. As we develop in Part I, the Second Circuit's overbroad equitable mootness standard does not require a consideration of the legal merits of an appeal or even whether it would be practicable to fashion some form of equitable relief that protected the paramount federal rights of senior creditors. In doing so, the Second Circuit applied a standard that was more restrictive than other circuits. In particular, the D.C. Circuit in *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986), and the Eleventh Circuit in *In re Club Assocs.*, 956 F.2d 1065 (11th Cir. 1992), require that an appellate court consider the legal merits and the remedial effect of the issue on appeal before determining whether it would be equitable to allow the appeal to proceed. Had the Second Circuit applied this standard, it would have determined not only that it could fashion equitable relief, but that the relief sought by Petitioners—that estate assets be equitably distributed among *all* stakeholders in accordance with the exclusive distribution scheme set forth in the Bankruptcy Code—was more equitable than the proffered governmental interests served by the dismissal. Regardless, it is vitally important that this Court bring consistency to the standard for the concept of finality, whether it is called "equitable mootness" or some other term.

Second, even assuming that the Second Circuit's version of "equitable mootness" states a proper standard for determining whether to hear an appeal from a consummated settlement, the Court used that doctrine to avoid deciding a matter of crucial importance regarding the Absolute Priority Rule under the Bankruptcy Code. By failing to determine the merits of this underlying federal question under the facts presented here, the court deprived the parties, and indeed

itself, of the opportunity to fashion relief that would have fostered this federal principle without upsetting the balance that equitable mootness seeks to preserve.

Pursuant to the Settlement, the Debtors will forfeit $715 million in estate assets to the Government, which the Government intends to distribute to the Debtors' shareholders ahead of unsecured creditors in violation of the Absolute Priority Rule. No plan for such distribution has yet been promulgated and no payment has yet been made to any subordinated shareholder. The Government asserts—without any legal basis—that it is entitled to distribute these forfeited funds without regard to the Absolute Priority Rule. It further asserts that it bargained for the unfettered right to distribute those funds regardless of the statutory strictures that would otherwise apply rather than seek forfeiture of other assets (which it subsequently conceded it would not be able to obtain), and rather than seek to indict Adelphia for the fraud committed by Adelphia's ousted insiders.

But the Government's insistence that equitable mootness immunizes its right to distribute the funds as it sees fit demonstrates the error of the doctrine as defined by the Second Circuit. Clearly, on appeal, after determining that the primary importance of the Absolute Priority Rule requires the appellate courts to consider the legality of this term of the Settlement, the courts can do the greatest equity by fashioning relief that would distribute the forfeited funds in a manner that complies with that rule. All other terms of the Settlement could be preserved without upsetting the expectations of any party—other than perhaps those of the Government, which cannot reasonably seek to vindicate a right to pay subordinated parties in violation of federal law and certainly knew that such "right" was at risk of reversal on appeal. It is clearly more equitable to preserve the established statutory rights and expectations of the Debtors' creditors and to reverse the illegal distribution scheme that the Government wishes to implement.

I.

There Is A Circuit Conflict On The Legal Standard For Determining Whether An Appeal From A Bankruptcy Court's Approval Of A Settlement Or Plan Of Reorganization Should Be Dismissed On The Grounds Of Equitable Mootness

A. As this Court held long ago in *Mills v. Green*, 159 U.S. 651, 653 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

This principle, known as Article III mootness, renders a dispute not justiciable and requires that an appellate court dismiss an appeal where it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (quoting *Mills, supra*) (1992). By contrast, an appeal is justiciable where "a court can fashion *some* form of meaningful relief," even though it "may not be able to return the parties to the *status quo ante*." *Id.* at 12. Indeed, this Court has stated that the courts have a "virtually unflagging obligation" to exercise their jurisdiction where it exists. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976).

Despite these well-established *jurisdictional* principles under Article III, the various circuit courts have crafted the doctrine of "equitable mootness," applicable solely to bankruptcy proceedings, whereby appellate courts dismiss appeals—*even though some form of meaningful relief may be crafted* and the courts unquestionably have jurisdiction—in order to satisfy "the important public policy favoring orderly reorganization and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court.' " *In re Public Serv. Co. of New Hampshire*, 963 F.2d 469, 471-72 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992). Each of the circuits that has adopted the equitable mootness doctrine has formulated its own version, but the various standards can be divided generally into three conflicting approaches:

> i. Those, like the Second Circuit here, that will dismiss an appeal even though the relief sought by appellants is practicable, where there has been "substantial consummation" of the debtor's reorganization or settlement and the court determines on a subjective basis that it would not be "equitable" to grant the requested relief. *Chateaugay I*; *Chateaugay II*; *Continental*, *supra*.
>
> ii. Those that will dismiss an appeal where the court determines on an objective basis that there is no "practicable" form of relief that can be granted without affecting the interests of other parties that relied on the finality of the bankruptcy court's approval, most of whom are not parties to the appeal. *In re GWI PCS 1 Inc.*, 230 F.3d 788 (5th Cir. 2000); *In re UNR Indus.*, *supra*; *In re PSC*, *supra*; *Central States S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981).
>
> iii. Those that consider the merits and the importance of the underlying legal issue on which the appellant seeks review in order to balance the equities between

> the interests of the appellant and those of other parties who claim to have changed their positions in reliance on the finality of the bankruptcy court's approval. *In re Club Assocs.*, 956 F.2d 1065, 1071 (11th Cir. 1992); *In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986).

The Second Circuit applied the first, subjective, test here, holding that because Petitioners did not obtain a stay and the Government had "substantially performed" its Settlement obligations during the pendency of the appeal, the burden shifted to Petitioners to "demonstrate that the relief they seek would not create inequitable results." (App. 3a-4a (citing *Chateaugay II*, 10 F.3d at 949-50).) The court did not consider whether effectual relief could be crafted without interfering with the aspects of the Settlement that had already been consummated; nor did it consider the importance of the legal issue on appeal. Instead, the court looked only to its view of the equities, determining that Petitioners had not met their burden to establish that it would not be inequitable to grant the relief requested: a requirement that the Government distribute the $715 million that Adelphia forfeited to it under the Settlement to creditors according to the Absolute Priority Rule. Thus, the court's dismissal based on equitable mootness created a result that is far less equitable than the relief sought by the appeal.

The Third Circuit adopted a similar version of "equitable mootness" in *Continental*, 91 F.3d 553, albeit in a sharply divided *en banc* decision where the court split by a vote of seven to six. The majority agreed with the Second Circuit that "an appeal should be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Id.* at 559 (citing *Chateaugay I*). The court did not rely simply on the existence of "substantial consummation", but it "assume[d] arguendo that even after substantial or total consummation of its reorganization, some effective relief would have been available . . . at the time they appealed."

Nonetheless, the court concluded that it would not be prudent to reach the merits or equitable to grant relief where investors had taken some action in reliance on the plan's finality. *Id.* at 561. As the dissent stated:

> [T]he majority does this even though (a) this case is clearly not "moot" in any proper sense of the term, (b) we unquestionably have statutory jurisdiction, and (c) we have a "virtually unflagging obligation" to exercise the jurisdiction we have been given. [citing *Colorado River*, 424 U.S. at 817]. . . . I am not convinced that the majority's test is consistent with the law of all the circuits that the majority claims to be following.

Id. at 568-69 (Alito, J., dissenting). After surveying the other circuits, the dissent concluded that the majority's "equitable mootness" doctrine:

> does not present a jurisdictional question; we are not required to consider it before proceeding to the merits; and even if we find that it is applicable, it does not necessarily dictate that we dismiss the appeal or affirm in its entirety a district court order of dismissal. Rather, we retain the ability to craft, or to instruct the district or bankruptcy courts to craft, a remedy that is suited to the particular circumstances of the case. Thus, a remedy could be fashioned in the present case to ensure that the Continental reorganization is not undermined.

Id. at 571-72.[9] Nonetheless, the majority adopted the Second Circuit's subjective "equitable" test, which conflicts with each of the other two tests.

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[9] In two subsequent decisions, the Third Circuit still followed *Continental* as controlling law, but applied that standard much more narrowly, focusing primarily on whether the plan had been so substantially consummated in a practical sense that it would be nearly impossible to unravel if the appeal were to proceed. *In re Zenith Elec. Corp.*, 329 F.3d 338, 343-45 (3d Cir. 2003); *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000). Thus, the Third Circuit has apparently moved closer to the objective "practicability" test rather than the Second Circuit's more

First, it conflicts with the objective "practicability" standard used in five other circuits. As the Fourth Circuit held in *Central States*, 841 F.2d at 96, "dismissal of the appeal on mootness grounds is required when implementation of the plan has created, extinguished or modified rights, particularly of persons not before the court, to such an extent that effective judicial relief is no longer practically available." Similarly, in the Ninth Circuit, in a decision that many courts credit with creating "equitable mootness," an appeal will be dismissed where the "plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned" and reversal would "knock the props out from under the authorization for every transaction that has taken place, [and] would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Roberts Farms*, 652 F.2d at 797.[10]

In the First Circuit as well, the court looks to the practicability of unwinding a substantially consummated reorganization:

> Appellate reversal of an order confirming a substantially consummated reorganization plan constructed within the framework of so many 'intricate and involved transactions[ ] . . . solely [founded on] the

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subjective, purely equitable test, but it has not fully adopted the *Continental* dissent's preference for reaching the underlying legal issues in order to determine whether it is possible to grant some form of relief.

[10] More recently, the Ninth Circuit reaffirmed the *Roberts Farms* practical approach when it refused to dismiss an appeal where, like here, the relief sought did not "present[ ] transactions that are so complex or difficult to unwind" and would "require only that one party disgorge money it has received, money that would then be distributed pursuant to the bankruptcy court's final decree." *In re Focus Media, Inc.*, 378 F.3d 916, 924 (9th Cir. 2004), *cert. denied*, 544 at U.S. 968. *See also In re Int'l Environmental Dynamics*, Inc., 718 F.2d 322, 326 (9th Cir. 1983) (appeal not dismissed where "court could fashion effective relief" affecting a party even after substantial consummation but without upsetting the reorganization).

> order confirming the plan . . .' would present a daunting assignment for the Humpty Dumpty repairman.

In re PSC, 963 F.2d at 474-75. This concept of impracticability or near impossibility is akin to this Court's Article III mootness principle in which there is no appellate jurisdiction because it is impossible to grant any effectual relief whatsoever. These circuits recognize that some form of relief may be effectual in remediating the harm that the appellant has suffered, but it would be so impracticable that it would not be prudent for the appeal to proceed and upset the public policy in favor of finality in bankruptcy.

Furthermore, when the circuits that follow this practicability principle look to the equities, they concern themselves with the impact that a grant of relief would have on "innocent third parties" who are not parties to the appeal and over whom the courts have no jurisdiction. *Id.* at 475 (unraveling the plan "would work incalculable inequity to many thousands of innocent third parties" who are not before the court); *In re GWI PCS 1*, 230 F.3d at 802-03 (after determining that numerous transactions had been completed following approval of the reorganization, the court looked to "whether the requested relief would affect the rights of parties not before the court or the success of the reorganization plan").

The Seventh Circuit has taken particular note of the similarities and differences between this "practicability" approach and traditional mootness principles. In *In re UNR Indus.*, 20 F.3d at 769, the court found that "[s]ince the plan went into effect, more than 15 million shares of New UNR have been distributed . . . , [w]arrants for additional stock have been issued and are trading . . . , [c]orporate acquisitions and divestitures (not to mention ordinary commercial transactions) have occurred," and other steps had been taken in furtherance of reorganization. The court noted that

"[u]ndoing all of this is impossible. Undoing part of it . . . is possible but has ramifications for the rest of the plan." *Id.* After surveying other circuits that had adopted equitable mootness, Judge Easterbrook stated:

> There is a big difference between inability to alter the outcome (real mootness) and unwillingness to alter the outcome ("equitable mootness"). Using one word for two different concepts breeds confusion. Accordingly, we banish "equitable mootness" from the (local) lexicon. We ask not whether this case is moot, "equitably" or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.

Id.[11] The court concluded that "it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal." *Id.* at 770.

Finally, the third approach, adopted in the Eleventh and D.C. Circuits, is akin to what was counseled by the dissent in *Continental*. The D.C. Circuit looked first to the origins of the doctrine in *Roberts Farms* and opined that it had been misinterpreted by subsequent courts.

> *Roberts Farms* does not stand for a bright-line rule that "substantial consummation" forecloses any possibility of relief from court- and creditor-approved reorganization plans. The opinion leaves undisturbed the notion that some claims may not be inescapably bound to the degree of implementation. . . . In exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligation to scruti-

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[11] In a subsequent Seventh Circuit case, Judge Posner reiterated that the term "equitable mootness" had been "anathematized" by Judge Easterbrook and the doctrine is more properly "an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties." *In re Envirodyne Indus.*, 29 F.3d 301, 304 (7th Cir. 1994).

> nize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole. "Substantial consummation" is not a blanket discharge of this judicial duty to examine carefully each request for relief.

In re AOV, 792 F.2d at 1148. The court determined that it had an obligation, in the absence of Article III mootness, to consider the merits of the appellants' claims and determine whether some form of relief can be fashioned that protects the appellants' legitimate legal interests, but "will not implicate or have an adverse effect on the interests of other, non-party creditors, and . . . will not affect the re-emergence of the debtor as a revitalized corporate entity." *Id.* at 1149.

This reasoning was followed by the Eleventh Circuit in *In re Club Assocs.*, 956 F.2d 1065. The court noted that "[c]entral to a finding of mootness is a determination by an appellate court that it cannot grant effective judicial relief," but it recognized that "[e]ven if substantial consummation has occurred, a court must still consider all the circumstances of the case to decide whether it can grant effective relief." *Id.* at 1069. The Eleventh Circuit agreed with *AOV* that this consideration included an obligation to examine the claims presented and weigh the impact of the relief sought on the consummated reorganization. *Id.* "The concept of mootness is based upon the premise that a court will undertake the task of carefully examining each issue presented on appeal." *Id.* That court ultimately determined that all of the appellant's claims and requests for relief would in fact "have jeopardized the Plan as a whole," and would have adversely affected non-parties whose "interests cannot be protected in the event of a reversal of the Confirmation Order." *Id.* at 1070-71.

It is clear, then, that the present case would have been judged under a different and more appropriate jurisprudential standard in the Eleventh and D.C. Circuits. Those standards (and the standard espoused by the dissent in the

Third Circuit) are more consistent with this Court's statements of Article III mootness and the obligation of courts to exercise the jurisdiction that they do have (*see Mills, supra*; *Colorado River, supra*), while still satisfying the policy in favor of finality in bankruptcy. While the Second Circuit looks to substantial consummation as the most important factor (despite the ability to fashion some effective relief), such that it shifts the burden to the appellant to demonstrate that it would not be inequitable even to consider its appeal, the Eleventh and D.C. Circuits hold that substantial consummation is only one factor, and not the most important one, in determining whether effective relief is available and should be granted. Those courts look to the merits of the individual claims and the need to protect the interests of third parties beyond the court's jurisdiction who relied on the finality of the plan approval order. The Second Circuit never even considered the issue on which Petitioners sought review. As more fully discussed in Part C of this section, had the Second Circuit followed the standard applied in the Eleventh and D.C. Circuits, it would have recognized that Petitioners' Absolute Priority Rule claim had substantial merit; that the relief sought by Petitioners would have done more equity than dismissal of the appeal; that the relief sought would have negatively impacted only one party that was present at all times; and that the relief would not have been adverse to the interests of that party nor undermined the Debtors' reorganization.

B. The Second Circuit also put great reliance on the Petitioners' decision not to obtain a stay of the Bankruptcy Court's order pending appeal. (App. 3a-4a.) This issue also would have been treated differently in other circuits (and by the dissent in *Continental*). The Eleventh Circuit held that "[d]espite the appearance that a failure to obtain a stay is a blanket discharge of an appellate court's duty to review a bankruptcy court's confirmation order, the fact remains that the absence of a stay does not compel a finding of mootness in all cases." *In re Club Assocs.*, 956 F.2d at 1070 n.13.

Similarly, the D.C. Circuit held "that failure to secure a stay is not per se dispositive of all the issues before us." *In re AOV*, 792 F.2d at 1147. In both cases, the courts considered the merits of the appeals and the impact that some form of relief would have on the consummated reorganization and innocent third parties. Here, the Second Circuit did neither, applying its own subjective mootness standard.

Again, the dissent in the Third Circuit sought to apply a more practical approach similar to that adopted in the Eleventh and D.C. Circuits. The dissent stated:

> [Appellants'] failure to obtain a stay in this case might limit the relief that would be available to them if they succeeded on the merits of the appeal, but it cannot justify the refusal at the outset even to consider their arguments.

Continental, 91 F.3d at 572 (dissent). It is this standard that should have been applied by the Second Circuit here. Instead, the Second Circuit improperly used its version of "equitable mootness" to decline to exercise its indisputable jurisdiction and to preclude any consideration of the merits or the practicability of some form of effectual relief.

C. Had the Second Circuit considered whether there was any merit to the issues and whether it might be possible to fashion some form of effective relief, it would have recognized the import of several indisputable facts. First, the issue on appeal involved the paramount importance of the Absolute Priority Rule, which this Court and others have found to be so important for a bankruptcy court to consider in approving a plan or a settlement that it will often be the dispositive factor. See Point II, *infra*. Second, the relief Petitioners requested would not have adversely or inequitably impacted any party that was beyond the court's jurisdiction. It affected only parties to the Settlement, all of whom were within the court's jurisdiction. Third, Petitioners' request for relief did not seek to overturn the entire Settlement and would not have affected the implementation of any reor-

ganization or undermined the central aspects of the Settlement. The relief would have affected only the Government's desire to distribute the $715 million forfeiture fund in a manner that was contrary to the Absolute Priority Rule. Those funds have not yet been distributed and they remain in the hands of the Government.[12] The only thing the Government would be prohibited from doing if Petitioners succeed on appeal would be to distribute those funds in an illegal manner contrary to the Absolute Priority Rule—which is certainly not a "right" that it could legitimately have expected would be immune from appellate review.

The Second Circuit did not consider any of these factors that would have been central to the analysis in the other circuits. Its only concerns were that Petitioners had not sought a stay and there had been substantial consummation of the Settlement while the appeal was pending. That constricted and overly cabined focus was improperly held to foreclose the court from exercising its jurisdiction to hear this appeal. In the face of the conflicting standards among the circuits, and the fact that this Court has never spoken to the issue of equitable mootness, this petition for writ of *certiorari* should be granted.

II.

Even Under The Second Circuit's Standard Of Equitable Mootness, The Court Of Appeals Should Have Fashioned The Relief Sought By Petitioners Because The Equities Weighed In Favor Of Such Relief

The Bankruptcy Code was established to provide a comprehensive system for marshalling and distributing the assets of a bankrupt entity to its creditors. *See* Thomas D.

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[12] Only $600 million has been turned over to the Government. Pursuant to the Settlement, the remaining $115 million will be paid when, and if, the post-confirmation estate recovers at least $230 million from the Bank Litigation. Thus, this part of the Settlement has not been fully consummated.

Crandall et al., The Law of Debtors and Creditors, § 10 (2002). This Court has observed that the Bankruptcy Code reflects a congressional intent, among other things, to achieve equality of distribution of a Debtor's assets among creditors of equal priority. *Begier v. IRS*, 496 U.S. 53, 58 (1990) (citing H. R. Rep. No. 95-595, at 177 (1977)) (discussing the policy underlying the Code's definition of property of the estate).[13] Thus, the Bankruptcy Code preempts any federal non-bankruptcy statute—like the forfeiture statute under which the Government proceeded here—that purports to affect priorities within a bankruptcy case without expressly superseding the Code. Collier, *supra*, ¶507.02[3][a]. A federal statute should not be enforced so as to upset the distribution scheme established by the Bankruptcy Code. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (provisions of the National Labor Relations Act did not affect a trustee's authority under 11 U.S.C. § 365 to reject a collective bargaining agreement). Yet that is precisely what the Government Settlement improperly does.

The Bankruptcy Code establishes an exclusive distribution scheme setting forth the priority in which creditors are to be paid from the proceeds of estate property, which furthers the goal of equitably distributing a bankrupt's assets

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[13] One of the primary reasons the Bankruptcy Code was promulgated was to resolve the problem of the inequitable distribution of estate assets outside the purview of the bankruptcy courts. *See* Bankruptcy Law Commission, *Report of the Commission on the Bankruptcy Laws of the United States*, HR Doc. No. 93-137, Part I (1973), reprinted in 4 Lawrence P. King, et al., *Collier on Bankruptcy*, App. Pt. 4(c) (15th Ed. Rev. 2006) at 4-260. To rectify these flaws, the Commission recommended a comprehensive statutory scheme designed to ensure that estate assets were not improperly siphoned off prior to bankruptcy, or at any other juncture. *See id.* Thus, bankruptcy courts are vested with jurisdiction "exclusive of all other courts" to collect and distribute a bankrupt's assets and to enter judgments necessary to enforce the provisions of the Code. *See* 28 U.S.C. 1334(e) and 11 U.S.C. § 105; see also *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *Katchen v. Landy*, 382 U.S. 323, 328-30 (1966); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 57-58 (1989).

among all stakeholders and protecting those assets from the encroachment of special interests. *See, e.g.*, 11 U.S.C. §§ 507, 1129. As this Court has observed, that statutory scheme—referred to as the Absolute Priority Rule—requires that, unless a class of creditors is paid in full, the "holder of any claim or interest that is junior to the claims of such impaired unsecured class will not receive or retain under the plan on account of such junior claim or interest any property." *Bank of Am. Nat'l Trust Savings Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999).[14]

The Absolute Priority Rule also is embodied in section 510(b) of the Bankruptcy Code, which subordinates claims arising out of the purchase or sale of a security to all claims senior to the security claim. 11 U.S.C. § 510(b). Congress specifically designed section 510(b) to preserve the creditor-shareholder hierarchy by prohibiting holders of claims with lower priority in a debtor's capital structure from improperly elevating them through an action for damages in connection with their acquisition of the security. In *In re Stirling Homex Corp.*, 579 F.2d 206, 210 (2d Cir. 1978), the Second Circuit observed:

> If the claims of alleged defrauded stockholders are not subordinated to the claims of conventional general unsecured creditors, a wholly new element will have

[14] The Absolute Priority Rule reflects a fundamental tenet of business law and the fair and efficient operation of the markets. A "stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors." *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 116 (1939). *See also* Elizabeth Warren, 54 U. Chi. L. Rev. 775, 792 ("An almost axiomatic principle of business law is that, because equity owners stand to gain the most when a business succeeds, they should absorb the costs of the business's collapse—up to the full amount of their investment."). Creditors extend credit in reliance upon the "cushion" provided by equity investors. *In re Granite Partners*, 208 B.R. 332, 336 (Bankr. S.D.N.Y. 1997). That cushion is unfairly diluted when those investors' claims are treated equally with creditors. *Id.*

> been created in the financial structure of business. No longer will creditors, whether banks, suppliers, or subcontractors, be free as they now are to extend credit in the ordinary course of business on their presumed right to be accorded priority over the claims of investors and speculators in securities, without first obtaining a secured basis which will guarantee them a priority status in the event their customer defaults. Such a fundamental change in the financial structure of the business community is unwarranted in the absence of legislation designed to overturn the long established rule of absolute priority.

Thus, to be fair and equitable, a plan of reorganization must comply with the Absolute Priority Rule. 11 U.S.C. § 1129; *see also SEC v. American Trailer Rentals*, 379 U.S. 594, 611-12 (1965) ("fair and equitable" are terms of art meaning that "senior interests are entitled to full priority over junior ones"). Moreover, it is established law that settlements by debtors also must comply with the Absolute Priority Rule in order to be "fair and equitable." *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414 (1968) ("The requirements of §§ 174 and 221(2) of Chapter X, 52 Stat. 891, 897, 11 U.S.C. §§ 574, 621(2), that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations.") Courts of Appeals, including the Second Circuit, have concluded that whether a proposed settlement respects the Absolute Priority Rule will be the most important—in most cases, the dispositive—factor in determining whether that settlement can be approved. *See In re Iridium Operating LLC*, 478 F.3d 452, 455 (2d Cir. 2007) (rejecting aspect of settlement that gave junior creditors right to payment from residual litigation recoveries ahead of senior creditor); *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S. 880 (1984) (bankruptcy court must apply fair and equitable standard in considering priority creditor's objections to settlement).

It is beyond dispute that the Government's intention to pay $715 million of the Debtors' assets to subordinated stockholders before all unsecured creditors have been paid in full violates the exclusive equitable distribution scheme in the Bankruptcy Code. The illegality of this payment cannot be vitiated by the intermediate transfer of estate assets to the Government for the purpose of making payments that the Debtors otherwise are prohibited from making. It is undisputed that the payments are going to be made, that the payments are going to be funded with the Debtors' assets, and that the recipients of those payments are prohibited by the Bankruptcy Code from receiving such payments directly from the Debtors. Thus, the Settlement impermissibly attempts to accomplish indirectly what the Bankruptcy Code prohibits. *See Virginia Elec. & Power Co. v. Caldor, Inc.*, 117 F.3d 646, 650 (2d Cir. 1997) (" '[I]n bankruptcy proceedings substance should not give way to form . . . .' ") (quoting *In re Fin'l News Network Inc.*, 980 F.2d 165, 169 (2d Cir. 1992)); *In re PCH Assocs.*, 804 F.2d 193, 199 (2d Cir. 1986) (substance trumps form with respect to considerations of a lease under section 502(b)(6)).[15]

Had the Court of Appeals addressed the merits of Petitioners' appeal, it would have had to conclude that Petitioners are entitled to the relief they seek. By declining to address the merits, the Court of Appeals not only ignored its indisputable jurisdiction to enforce applicable law, but improperly elevated the equities relating to the discreet

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[15] Viewing the Restitution Fund as a claim by the Government—and not as claims of subordinated stockholders for whose benefit the fund is being established—does not change the result. Even if the DOJ could have obtained an order of forfeiture, the claim would be subordinated under 11 U.S.C. § 726(a)(4), which provides that any "fine, penalty or forfeiture" is subordinated to all other classes of claims, except claims for interest accruing during the case. *See* H.R. Rep. No. 95-595, at 383 (1977); S. Rep. No. 95-989, at 96-7 (1978) (Section 726(a)(4) ensures that innocent creditors are not punished along with the debtors by subordinating claims for forfeiture or penalties).

interests of a single purported stakeholder—the Government—over the greater equities of ensuring the equitable distribution of the Debtors' assets to *all* of the estates' stakeholders. Even accepting the Government's argument below (unsupported by the record) that its decision to settle depended on its right to distribute the funds in disregard of the Absolute Priority Rule, the equities of the Government's right to the benefit of an illegal bargain are greatly outweighed by the equities favoring the relief sought by Petitioners. Even assuming that the Second Circuit's standard for equitable mootness is the proper standard, it was error for the Second Circuit to avoid reaching the merits of Petitioners' appeal. Had the court addressed those merits under applicable Supreme Court and Second Circuit precedent, it would have determined not only that it could fashion the requested relief without upsetting the entire Settlement or reorganization plan, but that the equitable considerations so essential to the application of the doctrine of equitable mootness did not preclude it from granting such relief.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit.

Dated: May 29, 2007

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	PAGE
Order of the Court of Appeals, Second Circuit, dated December 26, 2006	1a
Order on Petition for Rehearing and Rehearing En Banc of the Court of Appeals, Second Circuit, dated February 27, 2007	5a
Memorandum and Order of the United States District Court, Southern District of New York, dated February 23, 2006	7a
Decision of the United States Bankruptcy Court, Southern District of New York, dated May 20, 2005	15a
Order of the United States Bankruptcy Court, Southern District of New York, dated May 26, 2005	75a
Decision of the United States Bankruptcy Court, Southern District of New York, dated June 13, 2005	93a
Federal Rules of Bankruptcy Procedure, Rule 9019	106a
11 U.S.C.A. § 507	107a
11 U.S.C.A. § 510	114a
11 U.S.C.A. § 1129	115a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 06-1417-bk Lead, 06-1738-bk XAP
December 26, 2006

IN RE ADELPHIA COMMUNICATIONS CORPORATION,

Debtor,

AD HOC ADELPHIA TRADE CLAIMS COMMITTEE, OFFICIAL COMMITTEE OF UNSECURED CREDITORS, W.R. HUFF ASSET MANAGEMENT CO., LLC, U.S. NATIONAL BANK ASSOCIATION AS INDENTURE TRUSTEE,

Appellants,

—v.—

ADELPHIA COMMUNICATIONS CORPORATION,

Debtor-Appellee,

BANK OF AMERICA, N.A., BANK OF MONTREAL, WACHOVIA BANK, NATIONAL ASSOCIATION,

Appellees,

OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

Appellee-Cross-Appellant.[1]

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[1] The clerk of the court is requested to amend the official caption accordingly.

Appeal from the United States District Court for the Southern District of New York (Kaplan, J.).

Jonathan E. Minsker, Kasowitz, Benson, Torres & Friedman LLP, New York, NY, for Appellants-Cross-Appellees.

Eric B. Fisher, Morgenstern, Jacobs & Blue LLP, New York, NY, for Appellee-Cross-Appellant.

Brian E. O'Connor, Willkie Farr & Gallagher, LLP, New York, NY, for Debtor-Appellee.

Judith Elkin, Hayes & Boone LLP, New York, NY, for Appellees.

Barbara A. Ward, Assistant United States Attorney for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY, for Amicus Curiae the U.S. Department of Justice.

Present ROSEMARY S. POOLER, ROBERT A. KATZMANN, BARRINGTON D. PARKER, Circuit Judges.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal from the judgment of said District Court be and it hereby is DISMISSED.

Appellants challenge an order of the District Court, which held that the Bankruptcy Court had committed no

manifest error or abuse of discretion when approving settlements related to the estate of debtor-appellee Adelphia Communications Corporation ("Adelphia").[2] Debtor-appellee and appellees move pursuant to Rule 27 of the Federal Rules of Appellate Procedure to dismiss the appeal as equitably moot, or in the alternative, because the appeal constitutes an impermissible collateral challenge to a bankruptcy court's sale order. *See* 11 U.S.C. § 363(m). We assume the parties' familiarity with the facts, procedural history and specification of issues on appeal.

Adelphia and appellees correctly argue that the circumstances surrounding this appeal have changed comprehensively during the pendency of this appeal. *See In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir.1993). Additionally, the amici curiae Securities and Exchange Commission (the "SEC") and the U.S. Department of Justice (the "DoJ," collectively, the "government") point to the fact that the government declined to pursue massive civil fines and forebore mandatory forfeiture and even the criminal indictment of parties and non-parties to this case, in order to obtain settlements that would facilitate the creation of a victim restitution fund to compensate defrauded investors.

Appellants did not seek a stay before the government substantially performed its settlement obligations and the transfer and subsequent sale of the RMEs, which created comprehensively changed circumstances. Since they did not pursue with diligence all available remedies to

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[2] Appellee-cross-appellant challenges only the affirmance of that portion of the 9019 order reaffirming the existence of liens in property transferred to the Debtor during the pendency of the bankruptcy proceedings. This cross-appeal will be decided in a summary order issued simultaneously with this summary order.

seek a stay of execution to the objectionable 9019 order, they must demonstrate that the relief they seek would not create inequitable results. *See In re Chateaugay Corp.*, 10 F.3d 944, 949-50 (2d Cir.1993). They have made no such showing.

The DoJ and the SEC argue convincingly that the form of relief the appellants request would deny them-and only them-the benefits of their bargains in the four interrelated settlements approved by the 9019 order at issue. This would be grossly inequitable, given what the government bargained away to obtain. Appellants' argument that the government bargained only to obtain exclusive control of the victim restitution fund in the event that no court found it to be in conflict with the creditor priorities of the bankruptcy code is meritless. The phrase in the settlement that indicated that the creation of the fund is "subject to an applicable court approval process" clearly referred to Judge Sand's pending decision about whether to accede to the government's request, pursuant to the settlement, to forebear mandatory forfeiture.

Appellants ask this court to give them the benefit of the doubt on the issue of equitable mootness so that we might reach the merits of this appeal. They allege that the issue of equitable mootness is a close one, and that the appeal would be decided in their favor should we reach the merits. We disagree. The relief requested by appellants would be inequitable as a consequence of their failure to seek a stay, which created comprehensively changed circumstances.[3]

We therefore dismiss the appeal.

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[3] Any other form of relief, i.e., rescission of the agreements, would constitute an impermissible collateral challenge of the 363 orders. *See* 11 U.S.C. § 363(m); *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir.1991).

[LETTERHEAD OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT]

Date:	February 27, 2007
Docket Number:	06-1417-bk
Short Title:	In Re: Adelphia Communications Corp. v.
DC Docket Number:	05-cv-5707
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Lewis Kaplan

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of February two thousand seven.

In re: Adelphia Communications

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Ad Hoc Adelphia Trade Claims Committee, Official Committee of Unsecured Creditors, W.R. Huff Asset Management Co., LLC, U.S. Bank National Association as Indenture Trustee, Official Committee of Equity Security Holders of Adelphia Communications Corp.. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 5707(LAK)*
February 23, 2006

AD HOC ADELPHIA TRADE CLAIMS COMMITTEE,

Appellant,

—v.—

ADELPHIA COMMUNICATIONS CORP., *et al.*,

Appellees.

Edward S. Weisfelner, Brown Rudnick Berlack Israels, LLP (N.Y.C.), New York, NY, Official Committee of Unsecured Creditor of Adelphia Communications Corp., U.S. Bank National Association, as Indenture Trustee (Arahova), for Appellant.

Marc Ronald Abrams, Terence Kevin McLaughlin, Willkie Farr & Gallagher LLP (N.Y.), New York, NY, for Appellees.

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* The additional consolidated cases are 05 Civ. 5708, 05 Civ. 6161, 05 Civ. 6388, 05 Civ. 6692, and 05 Civ. 6862.

MEMORANDUM AND ORDER

KAPLAN, District Judge.

These are appeals from orders of the Bankruptcy Court approving three related settlement agreements relating to the Adelphia Communications scandal and adhering to that decision on reconsideration. One of the appellees cross-appeals from so much of the order approving the settlement agreements as authorized the debtors to grant to certain banks liens in entities that allegedly should be conveyed to the debtors free and clear of all liens.

The Appeals

In March 2002, Adelphia Communications Corp. ("Adelphia"), a company dominated by the Rigas family, disclosed that it was jointly and severally liable for more than $2 billion of borrowings attributed to certain entities owned by the Rigas interests but managed by Adelphia (the "RMEs") and that these liabilities were not reflected on Adelphia's consolidated balance sheets. It appeared also that part of those borrowings had been advanced to various Rigas family entities.

These disclosures set in motion a series of events disastrous for Adelphia, including the withdrawal of its auditors' opinion on its financial statements, defaults on credit facilities, delisting of its stock, governmental investigations, and a Chapter 11 filing by the company. The Securities and Exchange Commission ("SEC") sued the company and filed a proof of claim in the bankruptcy for, among other things, penalties, disgorgement, and prejudgment interest, which the SEC staff has indicated could amount to several billions of dollars. The risk of indictment hung over Adelphia. John and Timothy Rigas

ultimately were indicted and convicted in this Court of conspiracy and mail and bank fraud.

After protracted negotiations, Adelphia reached three interrelated settlement agreements with the Department of Justice ("DOJ"), the SEC, and the Rigases, the terms of which are summarized aptly in the opinion below and need not be repeated here save to note that principal terms included (1) the forfeiture by the Rigas family to the government of their interests in all but two of the RMEs followed by the government's conveyance of the forfeited entities to the company, (2) a contribution by Adelphia of $715 million to a government-established restitution fund for the purpose of providing restitution to persons who held publicly-traded securities of Adelphia that, in the government's determination, were victims of the fraud alleged in the Rigas indictment, (3) resolution of the SEC complaint by a consent injunction without payment by Adelphia of any disgorgement or civil penalty, and (4) agreement by the DOJ not to indict the company.

The appellants here, all unsecured creditors, were and remain deeply upset by the proposed settlement because its effect would be to allow equity holders to recover from the government-established restitution fund and thus to be paid ahead of them. They argued below primarily that the settlements were not in the best interests of the estate or fair, reasonable, and adequate, and that they violate the absolute priority rule.

In a comprehensive and able opinion,[1] Bankruptcy Judge Robert E. Gerber rejected these and other arguments and approved the settlements. He adhered to that

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[1] *In re Adelphia Comm. Corp.*, 327 B.R. 143 (Bankr.S.D.N.Y.2005).

ruling on reconsideration.[2] Having carefully considered the briefs and heard oral argument, I reject appellants' contentions, substantially for the reasons given by Judge Gerber. I write only to make a few additional observations.

First, at the core of appellants' argument are the related contentions that the government coerced the company into the settlements by the threat of indictment and that the court below failed to determine whether the government was bluffing.

The coercion argument is baseless. As Judge Gerber correctly noted, "where . . . 'coercion' results from differences in bargaining power, as a consequence of law or fact, or governmentally granted authority and discretion (such as the authority and discretion we grant to prosecutors, to achieve a common good), that is a wholly different kind of 'coercion.' As one of the banks' counsel aptly noted in argument on this motion, it is what we call 'leverage.' "[3] What the appellants characterize as coercion was no different in principle than the pressure that leads the overwhelming majority of defendants in criminal cases to plead guilty-the risk that a conviction after trial will result in a harsher sentence than is likely to be imposed following a guilty plea. Yet guilty pleas in such circumstances rightly are considered voluntary and uncoerced in any relevant sense. In *United States v. Baum*,[4] for example, this Court found that a guilty plea was voluntary and uncoerced despite a claim that the defendant felt impelled to plead by the imminence of the

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[2] *Id.*, 327 B.R. 175 (Bankr.S.D.N.Y.2005).

[3] 327 B.R. at 166.

[4] 380 F.Supp.2d 187 (S.D.N.Y.), *aff'd*, 139 Fed.Appx. 366 (2d Cir.2005).

trial and her alleged feeling that her counsel was not fully prepared. I wrote:

> "[I]t must be borne in mind that the issue of coercion in this context is not a purely subjective one. 'When a guilty plea is challenged as being the product of coercion, our concern is not solely with the subjective state of mind of the defendant, but also with the constitutional acceptability of the external forces inducing the guilty plea.'[5] So, for example, 'a State may encourage a guilty plea by offering substantial benefits in return for the plea,' including 'the possibility or certainty not only of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty, but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury.'[6] Such offers often present defendants with choices among unpleasant alternatives. But the fact that a plea of guilty is the most attractive option for the defendant from a subjective point of view does not render its offer constitutionally coercive. In other words, regardless of a defendant's subjective state of mind, the Constitution does not make the pressure generated by such entirely appropriate facets of the criminal process inappropriate."[7]

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[5] *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir.1986); *cf. Miller v. Fenton*, 474 U.S. 104, 115-16, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) ("Although sometimes framed as an issue of 'psychological fact,' the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension.").

[6] *Corbitt v. New Jersey*, 439 U.S. 212, 219-20, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (internal quotation marks and citations omitted).

[7] *Baum*, 380 F.Supp.2d at 210.

So too here. The government encouraged Adelphia to enter into the settlements by offering substantial benefits—including the elimination of the threat of criminal prosecution and of any SEC claim for disgorgement and civil penalties—in exchange for its agreement to the settlements. While the alternatives presented all were unpleasant, that does not render the situation coercive in any legally relevant sense. If, as is the case, a defendant constitutionally may be induced to plead guilty to a crime carrying a prison sentence by a threat that a trial could result in imposition of a death penalty,[8] surely Adelphia could pay $715 million to avoid indictment, with all its disastrous consequences, and a $5 billion disgorgement and penalty claim by the SEC.

The contention that the court below did not inquire into whether the government was bluffing in threatening to indict the company is, if anything, less meritorious. The record before Judge Gerber overwhelmingly demonstrated that the government explicitly threatened indictment and took an exceptionally "hard-nosed" position with respect to the amount that Adelphia would be required to pay in order to avoid that fate. That evidence was more than sufficient to justify Judge Gerber's findings that the risks that Adelphia faced were "of extraordinary magnitude"[9] and that there was "a 'real risk' of a criminal indictment . . . that would have [had] disastrous consequences to this reorganization."[10] Certainly there was no clear error.

Finally, appellants object strenuously to the settlements on the ground that the government is likely to dis-

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[8] *E.g.*, *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

[9] 327 B.R. at 160.

[10] *Id.*

tribute the victim restitution fund in part to equity security holders who could not take ahead of the appellants in a plan of reorganization in light of the absolute priority rule. Their premise is correct, as the court below recognized. The conclusion, however, does not follow. As Judge Gerber held, any payments from the restitution fund would be from "a fund to be created and owned by the Government," not a distribution of assets of the debtors' estates as part of a plan of reorganization.[11] They therefore would not come within the language of Sections 510(b) and 1129 of the Code.[12] Moreover, it is worth noting that if Adelphia had rejected the government's proposal and the government succeeded in forfeiting its assets, the government's interest in the assets would have been superior to those of the creditors in any case.

Appellants' unhappiness at the idea of a substantial distribution of assets that originated in the estate to equity holders who would have been subordinate to them had the assets been distributed as part of a plan of reorganization is entirely understandable. The proper focus for any complaint, however, is Congress, which alone is empowered to alter the terms of the Code to achieve the end that appellants desire.

The Cross-Appeal

Despite joining the debtors in supporting the settlements generally, the Official Committee of Equity Security Holders of Adelphia (the "Equity Committee") cross-appeals as to the Bankruptcy Court's approval of that part of the deal that preserved certain banks' pre-

[11] *Id.* at 169.

[12] U.S.C. §§ 510(b), 1129.

petition liens on the equity interests in the RMEs. Although the Equity Committee contends that the Bankruptcy Court did not hear from the interested parties or consider the issue properly before approving the preservation of the liens, the opinion demonstrates otherwise.[13] The decision to preserve the pre-petition liens as part of the approval of the Settlement was well within the Bankruptcy Court's discretion.

Conclusion

For the foregoing reasons, the orders appealed from are affirmed in all respects.

SO ORDERED.

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[13] *See, e.g.*, 327 B.R. at 154, 168, 173.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-41729 (REG)
May 20, 2005

IN RE ADELPHIA COMMUNICATIONS CORP., *et al.*,

Debtors.

Willkie Farr & Gallagher LLP, by Marc Abrams, Esq. (argued), Paul V. Shalhoub, Esq., Brian E. O'Connor, Esq., Terence K. McLaughlin, Esq., Rachel C. Strickland, Esq., Morris J. Massel, Esq., Jamie M. Ketten, Esq., New York, NY, Boies, Schiller & Flexner LLP by Philip C. Korologos, Esq. (argued), George Carpinello, Esq., Eric Brenner, Esq., Armonk, NY, Covington & Burling by Alan Vinegrad, Esq., New York, NY, Foley & Lardner LLP, by Gregory S. Bruch, Esq., Washington, D.C., for Debtors and Debtors in Possession.

David N. Kelley, United States Attorney, by Richard D. Owens, Assistant United States Attorney, Christopher J. Clark, Assistant United States Attorney (argued), Judd C. Lawler, Assistant United States Attorney, New York, NY.

Dilworth Paxson LLP, by Lawrence G. McMichael, Esq. (argued), Martin J. Weis, Esq., Philadelphia, PA, Brown, Raysman, Millstein, Felder & Steiner LLP, by

Gerard S. Catalanello, Esq., Shannon R. Wing, Esq., New York, NY, for the Rigases.

Kasowitz, Benson, Torres & Friedman LLP, by David M. Friedman, Esq. (argued), Adam L. Shiff, Esq., Jonathan E. Minsker, Esq., New York, NY, for the Official Committee of Unsecured Creditors.

Bragar, Wexler, Eagel & Morgenstern, P.C., by Peter D. Morgenstern, Esq. (argued), Gregory A. Blue, Esq., Eric B. Fisher, Esq., Andrew Buck, Esq., New York, NY, for the Official Committee of Equity Security Holders.

Hennigan, Bennett & Dorman LLP, by Bruce Bennett, Esq. (argued), James O. Johnston, Esq., Los Angeles, CA, by A. Brent Truitt, Esq., New York, NY, for the Ad Hoc Committee of ACC Senior Noteholders.

Seward & Kissel LLP, by Arlene R. Alves, Esq., New York, NY, for Law Debenture Trust Company of New York, as ACC Senior Notes Trustee.

Brown, Rudnick, Berlack, Israels LLP, by Edward S. Weisfelner, Esq., New York, NY, by Steven D. Pohl, Esq. (argued), Boston, MA, for the Ad Hoc Adelphia Trade Claims Committee.

White & Case LLP, by J. Christopher Shore, Esq. (argued), Douglas P. Baumstein, Esq., New York, NY, by Thomas E. Lauria, Esq., John K. Cunningham, Esq., Gerard Uzzi, Esq., Miami, FL, for the Ad Hoc Committee of Arahova Noteholders.

Andrews Kurth LLP, by Peter S. Goodman, Esq. (argued), Justin R. Wyatt, Esq., New York, NY, by Hugh M. Ray, Esq., Houston, TX, for the Ad Hoc Committee of Senior Preferred Shareholders.

Fried, Frank, Harris, Shriver & Jacobson LLP, by Gregg L. Weiner, Esq., Gary Kaplan, Esq. (argued),

Craig M. Price, Esq., New York, NY, for W.R. Huff Asset Management Co., L.L.C.

Sheppard, Mullin, Richter & Hampton LLP, by David McCarty, Esq., Los Angeles, CA, for U.S. Bank National Association, as Indenture Trustee in Respect of the Arahova Notes and the FrontierVision Notes.

Chapman and Cutler LLP, by James E. Spiotto, Esq., Ann Acker, Esq., Chicago, IL, for the Certain FrontierVision Noteholders.

Emmet, Marvin & Martin, LLP, by Edward P. Zujkowski, Esq., Martin Eisenberg, Esq., New York, NY, for The Bank of New York, as Indenture Trustee.

Haynes and Boone, LLP, by Judith Elkin, Esq., Glenn M. Kurtz, Esq., Karen M. Asner, Esq., New York, NY, by Thomas E. Kurth, Esq., Robin E. Phelan, Esq. (argued), Richard Anigian, Esq., Dallas, TX, for Bank of America, N.A.

Mayer, Brown, Rowe & Maw LLP, by J. Robert Stoll, Esq., Robert J. Ward, Esq., Kenneth E. Noble, Esq. (argued), New York, NY, for Bank of Montreal, as Administrative Agent for the Olympus Lenders.

Simpson, Thacher & Bartlett LLP, by Peter Pantaleo, Esq. (argued), William T. Russell, Jr., Esq. (argued), New York, NY, for Wachovia Bank, N.A., as Administrative Agent for the UCA Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by Luc A. Despins, Esq., New York, NY, for Citibank, N.A., as Administrative Agent for the Century-TCI Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by James C. Tecce, Esq., New York, NY, for JPMorgan Chase Bank, as Administrative Agent for the FrontierVision Lenders.

Luskin, Stern & Eisler LLP, by Michael Luskin, Esq., Trevor Hoffmann, Esq., New York, NY, for The Bank of Nova Scotia.

Cleary Gottlieb Steen & Hamilton LLP, by Mitchell A. Lowenthal, Esq. (argued), New York, NY, for 13 Investment Banks.

Chadbourne & Parke LLP, by Andrew P. Brozman, Esq., New York, NY, for Credit Lyonnais New York Branch, Credit Lyonnais Securities (USA) Inc., and LCM I Limited Partnership.

Ballard, Spahr, Andrews & Ingersoll, LLP, by William Slaughter, Esq. (argued), Philadelphia, PA, for Comcast.

Morgan, Lewis & Bockius LLP, by Richard S. Toder, Esq. (argued), Neil E. Herman, Esq., New York, NY, for Century/ML Cable Venture.

Proskauer Rose LLP, by Bradley I. Ruskin, Esq. (argued), Jeffrey Levitan, Esq., Scott A. Eggers, Esq., Karen Coombs, Esq., New York, NY, for ML Media Partners, L.P.

Angel & Frankel, P.C., by Joshua J. Angel, Esq., Laurence May, Esq. (argued), John H. Drucker, Esq. (argued), Leonard H. Gerson, Esq., Kirby McInerney & Squire LLP, by Richard L. Stone, Esq., Mark A. Strauss, Esq., Abbey Gardy, LLP, by Arthur N. Abbey, Esq., Judith L. Spanier, Esq., Stephen T. Rodd, Esq., Richard B. Margolies, Esq., New York, NY, for Consolidated Class Action Plaintiffs.

Rutan & Tucker, LLP, by William M. Marticorena, Esq., Costa Mesa, CA, for the County of San Diego, California.

Miller & Van Eaton, LLP, by Kenneth A. Brunetti, Esq., San Francisco, CA, by William Malone, Esq., Washington, D.C., for the City of Carlsbad, California.

BENCH DECISION ON MOTION TO APPROVE SETTLEMENT AGREEMENTS

ROBERT E. GERBER, Bankruptcy Judge.

In this contested matter in the jointly administered chapter 11 cases of Adelphia Communications Corporation and its subsidiaries (the "Debtors"), Adelphia moves for authorization to enter into three related agreements, collectively embodying a four-way settlement with the United States Department of Justice, the Securities and Exchange Commission, and members of the family of John Rigas, Adelphia's founder and former CEO. The settlement addresses, among other things, the DoJ's ability to indict Adelphia itself, the SEC's action and proof of claim against Adelphia, and Adelphia's presently pending adversary proceeding against the Rigases. The motion has engendered a considerable number of objections, principally by unsecured creditors, who express the concern, probably with some justification, that a victims restitution fund that the DoJ and SEC will establish with settlement proceeds will go in major part to equity holder victims of Adelphia fraud, whose recoveries in this Court would be subordinate to creditors under normal bankruptcy priorities.

The motion requires the Court to consider whether the settlement is in the best interests of the estate and is fair and equitable. It also requires the Court to consider whether the settlement inappropriately prejudices the substantive rights of any stakeholder.

After considering the parties' written and oral arguments, and the evidence at an evidentiary hearing, I conclude that the settlement is in the best interests of the estate and fair and equitable. I further conclude that while the estate's contractual arrangements with the counterparties to its settlement agreements should be approved (and without any change), certain internal measures, within these chapter 11 cases, are appropriate to avoid undue prejudice to creditors as a consequence of the settlement, which I should establish within the approval order.

Accordingly, the settlement is approved, with certain additional measures being included within my approval order to protect rights following the implementation of the settlement. The following are my Findings of Fact, Conclusions of Law, and bases for the exercise of my discretion in connection with this decision.

Findings of Fact

Under my Case Management Order # 3, factual assertions in motions in contested matters are taken as true unless controverted. Under that order as well, direct testimony is taken by affidavit, and cross-examination and any subsequent testimony is taken live. After reviewing the direct testimony affidavits and designated deposition testimony (cross-examination having been waived) of Adelphia's witnesses, Lead Director Anthony Kronman and Covington & Burling lawyer Alan Vinegrad, I find their testimony—by affidavit and in their depositions—wholly credible, and I accept it in full. Without getting into all of the detail that characterizes the record on this motion, I summarize my factual findings, and my conclusions based upon them, below.

A. Background

Just as Adelphia owns numerous cable companies, so do the Rigases personally, through business entities ("Rigas Family Entities")—corporations, general partnerships, limited partnerships, and limited liability companies—that own cable properties that generate substantial revenues, and are not debtors before this or any other court. About 16 of the Rigas Family Entities, operating 11 cable systems, are currently managed by Adelphia on a day-to-day basis; they are referred to as the "Managed Entities."

In March 2002, Adelphia disclosed that it was jointly and severally liable for more than $2 billion of borrowings attributed to certain of the Managed Entities under credit facilities (the "Co-Borrowing Facilities") that were not reflected as debt on Adelphia's consolidated financial statements. It also appeared that a portion of the borrowings for which Adelphia entities were jointly and severally liable had been advanced to various Rigas Family Entities to finance purchases of Adelphia securities.

In the aftermath of this disclosure, the stock of ACC was delisted from the NASDAQ National Market; Deloitte & Touche LLP ("Deloitte"), the Debtors' independent auditor at that time, suspended its auditing work on Adelphia's consolidated financial statements for the year ended December 31, 2001 and withdrew its opinion for prior consolidated financial statements; and Adelphia and its subsidiaries ultimately defaulted under various credit facilities, notes and preferred stock.

In addition, a special committee of ACC's Board of Directors (the "Board"), composed solely of three members of the Board who were not members of the Rigas Family, commenced a formal investigation into related party transactions between Adelphia entities and mem-

bers and Rigas Family Entities. This investigation led to the public disclosure of previously undisclosed information about the Rigas Family's co-borrowing activities, related party transactions, and involvement in accounting irregularities. In May 2002, the Rigases resigned their positions as officers and directors of Adelphia.

With no access to traditional sources of liquidity in the capital markets, pending governmental agency investigations, mounting litigation, default notifications under various credit instruments, and the resulting risk of collection and foreclosure actions by creditors, the Debtors filed for chapter 11 protection in June 2002.

B. Government Actions

After the disclosure of the improprieties, the DoJ and the SEC (collectively, the "Government") also initiated significant actions against, or investigations of, the Rigases, Adelphia as an entity, and others. This included criminal prosecutions and related forfeiture proceedings in the district court, initiated by the DoJ, and a civil action in the district court and proof of claim in this Court by the SEC.

(1) The Criminal Prosecutions

Following Government investigation of the matters described in part above, John, Timothy and Michael Rigas were indicted for numerous alleged violations of federal law. Although none of the Debtors were indicted, at no point did the DoJ rule out such a possibility—although the Debtors requested as early as the Summer of 2002 that the DoJ agree not to pursue an indictment of Adelphia. After a jury trial in the district court (Hon. Leonard Sand, U.S.D.J.), John and Timothy Rigas were convicted of conspiracy to commit fraud and several

counts of mail fraud and bank fraud. The jury acquitted Michael Rigas of some of the charges, but could not reach agreement with respect to others.

Since the time the Rigases themselves were indicted, the DoJ has considered whether, in addition to having indicted John, Timothy and Michael Rigas, it would indict Adelphia itself. In addition, the DoJ has advised Adelphia's counsel on several occasions that there is a "real risk" of an indictment of Adelphia. For example, when the Creditors' Committee announced its plan of reorganization term sheet in November 2004, which contained terms inconsistent with the Government's expectations, only the extensive efforts and assurances of the Debtors and their advisors avoided a possible indictment. More recently, the Debtors were threatened with indictment if they were unable to reach agreement on settlement terms with the DoJ and the Rigas Family by the previously scheduled sentencing date of April 18, 2005 for John and Timothy Rigas.

That was so even though Adelphia and its counsel provided the Government with very substantial cooperation in its investigation and prosecution of the Rigases.

Additionally, the DoJ has initiated proceedings to secure the criminal forfeiture of the Managed Entities, and has threatened Adelphia with the possibility of indicting such Managed Entities—matters of considerable concern to Adelphia, given Adelphia's own litigation against the Rigases, and Adelphia's own efforts to recover the Managed Entities in partial satisfaction of the losses Adelphia itself suffered under the Rigases' watch.

(2) The SEC Action

On July 24, 2002, the SEC filed a civil enforcement action (the "SEC Action") against ACC, certain mem-

bers of the Rigas Family and others, alleging securities fraud and improper books and records claims. On December 3, 2003, the SEC filed a proof of claim in this Court for, among other things, penalties, disgorgement and prejudgment interest in an unspecified amount based on the allegations in the SEC Action. The SEC staff has indicated that its asserted claims could amount to several billions of dollars of liabilities.

The SEC has informed Adelphia's advisors that, in the absence of a settlement, the SEC would seek hundreds of millions of dollars of civil penalties and the disgorgement from the Debtors of all funds raised through public offerings during the period that the Debtors' financial statements contained material misstatements and omissions. The amount of such funds (excluding the securities placed with the Rigases) is between approximately $5 billion and $6 billion.

In July 2004, the Creditors' Committee initiated an adversary proceeding against the SEC related to the SEC's proof of claim-seeking, among other things, to subordinate the SEC's claim to all of the claims and interests that are senior or equal to the claims and interests on whose behalf the SEC claim has been asserted. In that adversary proceeding, the Creditors' Committee made contentions very similar to those it makes here—that under bankruptcy law, claims of creditors must be satisfied before distributions to equity can be made, and that the SEC's claim must be subordinated under Bankruptcy Code section 510(b). I granted motions by the Equity Committee and the Unofficial Committee of Trade Claims holders to intervene. The SEC thereafter moved to dismiss the adversary proceeding on an asserted absence of a justiciable case or controversy, and the Creditors' Committee cross-moved for summary

judgment. The briefing as to those motions is still underway.

C. The Adelphia-Rigas Action

In July 2002, Adelphia commenced an adversary proceeding in this Court (the "Adelphia-Rigas Action") against the Rigases, other former Adelphia employees, and several Rigas Family Entities. Adelphia's adversary complaint generally alleged that the Rigases misappropriated billions of dollars from Adelphia in violation of their fiduciary duties. In November 2002, Adelphia filed an amended complaint against the defendants, expanding upon the facts alleged in its original complaint, and alleging state law claims for breach of fiduciary duty, fraudulent concealment, fraudulent misrepresentation, conversion, waste of corporate assets, breach of contract, unjust enrichment, fraudulent conveyance, constructive trust, inducing breach of fiduciary duty, and a request for an accounting, and federal claims under RICO and the Securities Exchange Act of 1934.

The Rigases moved to dismiss the amended complaint. I denied that motion insofar as it covered the common law claims, and took the portion of that motion that dealt with the RICO and 34 Act claims under advisement. With the agreement of the parties, that aspect of the decision was held in abeyance.

In August 2004, after John and Timothy Rigas were convicted, Adelphia moved for partial summary judgment against John, Timothy, Michael and James Rigas, and several Rigas Family Entities on the unjust enrichment and constructive trust counts of the amended complaint—seeking, among other relief, judgment in the amount of approximately $3.2 billion. That motion was fully briefed but oral argument on it was deferred in light of the proposed settlement.

D. Negotiation of the Settlement Agreements

Given the extraordinary challenges posed by the DoJ's indictment threats and the SEC claims, the Adelphia Board acted to ensure that Adelphia had retained outside counsel with preeminent experience to represent Adelphia's interests. Thus, in addition to Adelphia's existing litigation counsel, Boies, Schiller & Flexner, and its regular bankruptcy and corporate counsel, Willkie Farr & Gallagher, Adelphia also retained Alan Vinegrad of Covington & Burling ("C & B") as its principal white-collar defense counsel, and Gregory S. Bruch of Foley & Lardner as its principal SEC counsel. Mr. Vinegrad served as the United States Attorney for the Eastern District of New York and the Chief Assistant U.S. Attorney, Chief of the Criminal Division, Deputy Chief of the Criminal Division, Chief of Civil Rights Litigation, and Chief of General Crimes. Mr. Bruch spent 12 years with the SEC Division of Enforcement, where he served as assistant director.

Adelphia and the Board were also advised by Adelphia's General Counsel, Brad Sonnenberg, who joined Adelphia in July 2003. Mr. Sonnenberg served as an Assistant U.S. Attorney for the Department of Justice, where he prosecuted white collar crimes, and therefore also had substantial experience in these types of matters.

From the time the SEC Action was filed in July 2002, Adelphia's advisors engaged in ongoing discussions with the SEC and the DoJ about how Adelphia's issues with the Government might be resolved. I am intentionally not setting forth the specifics of Adelphia settlement proposals, or the substantial legal advice Adelphia obtained with respect to the settlement negotiations, but am including enough of the detail to document the substantial effort Adelphia made to negotiate the best set-

tlement possible, and the considerable care with which it engaged in the settlement process.

In these discussions, the SEC had proposed that the Debtors settle the SEC Action and resolve all outstanding issues with the DoJ for $1 billion, which the SEC said was 20% of its disgorgement claim. The Board was also informed that the DoJ—which was still in the midst of its criminal case against John, Timothy, and Michael Rigas—had not had a chance to formulate a view of the "right" settlement number.

Because any settlement necessarily would have to be a comprehensive one that included the DoJ, and because the DoJ indicated that it needed to complete its criminal trial of the Rigases before being able to evaluate, let alone negotiate, its position on a consensual resolution of Adelphia's criminal issues, formal settlement negotiations to resolve the Government Claims were not pursued while the DoJ's criminal case against the Rigases proceeded to trial. Nonetheless, as the criminal trial moved closer to completion, the Board, together with its advisors, discussed how to respond to the SEC's $1 billion settlement demand. In the meantime, Adelphia and its lawyers continued to provide extensive assistance to the DoJ in connection with the ongoing criminal trial.

In connection with a June 1, 2004 Board Meeting, the Board received information concerning selected recent SEC settlements in financial fraud and related cases and was advised of each case's relevance to the SEC's claims against Adelphia. The Board was also provided with a copy of an April 29, 2004 speech by Steve Cutler, the SEC's Director of Enforcement, which provided a structure for considering the appropriate measure of a civil penalty against Adelphia.

The Board was also provided with a quantitative analysis by Adelphia's financial advisors, Lazard Freres,

which compared the settlement in the *WorldCom* case, which had provided the SEC with $750 million in value as the distribution on an allowed claim of a face value of $2.25 billion, with the $1 billion dollar settlement figure mentioned by the SEC to Adelphia's advisors. The Board understood that the *WorldCom* settlement was likely to be viewed as a benchmark for any Adelphia settlement. Thus, the Lazard analysis sought to calculate a variety of possible Adelphia settlements based on a comparison of Adelphia to WorldCom using a number of potentially relevant metrics, such as market value, total distributable value, sales, and EBITDA.

Because the Lazard analysis showed that Adelphia, compared to WorldCom, had raised far more capital in the public markets during the alleged period of the fraud, this metric suggested that the $1 billion settlement demand was reasonable. But according to most of the metrics used in the Lazard analysis, a $1 billion settlement of the SEC Action seemed disproportionate to the $750 million settlement of the SEC's claims against WorldCom.

Accordingly, after considerable analysis and discussion, Adelphia's Board authorized the first of its several settlement proposals—a meaningful amount, but much less than the amount of the proposed settlement amount now. But after considering comments from Adelphia's Creditors' Committee, Adelphia changed, adversely to the Government, the size and currency of its settlement proposal, and Adelphia instead made a proposal in a lesser amount, and in the currency not of cash, but rather of common stock of a reorganized Adelphia.

But the SEC rejected this offer. After the conclusion of the Rigas criminal trial in early July 2004, the DoJ joined in supporting the $1 billion settlement figure proposed by the SEC, though it stated that such a settlement

would resolve both the DoJ's and SEC's claims. The Adelphia Board, now caught in a crossfire between the DoJ and the SEC, was informed that the Government indicated that it had two powerful weapons at its disposal—indictment and forfeiture—and that the Government would consider using them if Adelphia was unwilling to pay $1 billion towards compensation for the victims of the crimes committed by convicted members of the Rigas management. In support of its $1 billion demand, the Government cited, among other things, its view that $1 billion was the approximate value of the Managed Entities that the Government intended to seize in full or partial satisfaction of the approximately $2.5 billion forfeiture obligations of John and Timothy Rigas.

Adelphia and its Board faced these challenges even though C & B had made a presentation to the Government in November 2004 regarding the so called "Thompson" factors—factors federal prosecutors are to consider following in deciding whether to seek criminal charges against a corporation. These factors, which are publicly available, were argued by C & B, as they are argued by objectors here, to tilt—materially—in favor of a decision *not* to indict.

But the Government expressed a different view. It asserted that the "Thompson" factors, as applied to Adelphia, were essentially in equipoise and that, in the Government's view, the amount of restitution to be paid to victims was the "swing" issue that would decide whether the balance would tip in favor of, or against, indictment. The Government expressed the view that Adelphia's initial offer was inadequate to tip the balance against indictment and that there was therefore a "real risk" that Adelphia would be indicted in the absence of meeting the Government's $1 billion demand.

As the discussions continued, Adelphia's management, Board and advisors came to believe (and I believe reasonably so) that the Government's very tough and resistant position in the settlement negotiations was based upon an estimate of what the Government believed it had the power to do to the Debtors, and what costs the Government could impose upon the Debtors by exercising those powers. The magnitude of those costs appeared to be the crucial determinant in arriving at the settlement figure on which the Government insisted in the negotiations. And given the powers the Government had, and its very credible threat to exercise them with devastating consequences, Adelphia's Board felt (once more, reasonably, in my view) that it had no practical alternative other than to acknowledge the reality of the very tough spot Adelphia found itself in. The Board therefore began to view potential settlement offers against the benchmark of whether (notwithstanding the precedents) the cost of settlement was outweighed by the harm that settlement avoided—by insuring that the Government did not exercise its powers in the way the Government was threatening. In other words, the focus evolved from a review of "comparables" in similar settlements to a more self-introspective analysis of the situation Adelphia was in, and the damage to Adelphia that could result if Adelphia were indicted.

As a result, with a unanimous vote, the Adelphia Board authorized a second, higher, offer (partly in litigation trust certificates and partly in stock) that had been recommended by the Company's advisors. This offer was communicated to the Government in December 2004. As with Adelphia's prior offer, this second offer was contingent on Adelphia obtaining title to the Managed Entities.

But the DOJ responded to the second offer by reaffirming its $1 billion proposal, noting that the Debtors' proposal (even at this higher number) was "just this side of insulting."

As part of the preparation for a Board meeting to be held on February 10, 2005, the four law firms advising Adelphia's Board prepared and delivered a detailed joint memorandum—25 pages in length, single spaced—that reviewed (i) the risks posed by the Government's claims, (ii) the status of the settlement negotiations between Adelphia's advisors and the Government, and (iii) the approval process that would be required for a settlement of the Government Claims and the legal framework the Board should use to determine whether to enter into such a settlement. I have reviewed this memorandum, but consider it unnecessary and inappropriate to discuss it in detail here—particularly in light of the possibility that any decision on my part approving the settlement might be overturned on appeal. It is sufficient for purposes of this discussion to say that the memorandum was thorough and thoughtful, and that it very ably counseled the Board on the strengths and weaknesses of Adelphia's position, and the risks Adelphia faced.

Ultimately, after lengthy consideration and debate, the Adelphia Board concluded that Adelphia was likely to lose more if it did not go forward with a settlement on terms much closer to what the Government had been demanding for months. The Board discussed the fact that the Government fully appeared to intend to take the Managed Entities by forfeiture if a settlement was not promptly reached. I find that this conclusion was, at the least, reasonable. While the Adelphia Board had been informed that Adelphia had arguments it could make against forfeiture, it was told that Adelphia's prospects of prevailing were uncertain at best, and there was thus

a very real risk that these arguments would be unavailing and forfeiture would deprive the estate of assets worth between $800 million to $1 billion. Even worse, the Board had come to believe that the Government would demand, on threat of indictment, that Adelphia make up the difference if the Managed Entities lost value in the Government's hands, as was almost certain, since the Government would not have the expertise or the resources to operate cable companies.

Thus, Adelphia faced a "double hit" of losing the Managed Entities and being forced to compensate for the loss of value of the Managed Entities in the Government's hands. With those factors, among others, in mind, the Adelphia Board considered a third proposal to the Government, at a still higher amount, at its meeting of February 10. While the third offer the Board was considering was now quite large, the Board believed that it would still save Adelphia, at minimum, hundreds of millions of dollars in this extremely plausible scenario. It would also eliminate once and for all the still very real risk of an indictment that would have had catastrophic consequences for the Debtors.

In considering the third proposal, the Board considered concerns voiced by the Creditors' Committee, and by a major unsecured creditor, W.R. Huff. The Creditors' Committee took the position, among others, that any settlement should be funded by value that would otherwise be provided to the holders of bank claims, and that if Adelphia came to a settlement inconsistent with that position, the Creditors' Committee would object to any settlement. Huff took the position that the Adelphia directors would be breaching their fiduciary duties to Adelphia if they authorized the offer that the Board's advisors had recommended.

The Board concluded that there was no way to reconcile the Creditors' Committee position with the reality of the negotiations with the Government. I agree. Also, there was no way to reconcile the Creditors' Committee position with the requirements of due process. As discussed more fully below, it may turn out to be, after full opportunity for all parties to put on evidence and be heard, that co-borrowing banks, or others, should bear financial responsibility for the damage Adelphia suffered. But this was not the appropriate time, or manner, to do that. And at the risk of stating the obvious, a decision to charge the banks would be one for me or a higher court to make, and not an appropriate one to be made as part of a deal between Adelphia and the Government, in which the banks would have no opportunity to present their defenses or otherwise be heard.

Similarly, I cannot agree that by making a settlement proposal at the level of the third offer (or, for that matter, at higher levels, up to the level of the proposal that is the subject of this motion), the Board would, or did, breach its fiduciary duty. To the contrary, I find exactly the opposite. While as discussed more fully below, the propriety of a settlement is gauged by a standard more demanding than the business judgment rule (which more demanding standard, as discussed below, I find likewise to have been satisfied), the Board's conduct more than amply satisfied all of the requirements of the business judgment rule.[1] The Board's business decision was made with disinterestedness and in good faith, and with much

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[1] In four published decisions, and countless unpublished ones, I have noted the standards applicable to an exercise of business judgment in this Circuit and district, most notably as articulated by Chief Judge Mukasey of this district in *Official Comm. of Subordinated*

more than due care—indeed with painstaking care, after considering the views of skilled advisors and the stakeholders in this case, and with an appropriate consideration of the good of the enterprise as a whole. My review ensures that there was no abuse of discretion on the part of the Board, or waste of corporate assets. Any suggestion that the Board's actions were a breach of fiduciary duty would be frivolous.

Adelphia's third offer to the Government was not accepted, but it elicited a counteroffer of $750 million. Subsequent efforts by Adelphia's counsel were successful in getting the Government to move down to $725 million, but the Government refused any further reductions. At about this time, the Government expressed the desire to include, as part of any settlement with Adelphia, a resolution of the Government's claims against the Rigases and of Adelphia's claims against the Rigases. The Government also told Adelphia that it would permit the Rigases to keep approximately $90 million in property (including 23,000 of their approximately 227,000

Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650 (S.D.N.Y.1992) (Mukasey, C.J.) ("*Integrated Resources*").

As described in *Integrated Resources:*

> The business judgment rule's presumption shields corporate decision-makers and their decisions from judicial second-guessing when the following elements are present: "(1) a business decision, (2) disinterestedness, (3) due care, (4) good faith, and (5) according to some courts and commentators, no abuse of discretion or waste of corporate assets."

Id. at 656. *See also In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr.S.D.N.Y.2003); *In re Adelphia Communications Corp.*, 2003 WL 22316543, at *30-*31 (Bankr.S.D.N.Y. Mar.4, 2003); *In re Adelphia Communications Corp.*, 2004 WL 1634538, at *2 (Bankr.S.D.N.Y. June 22, 2004); *Adelphia Communications Corp. v. Rigas (In re Adelphia Communications Corp.)*, 323 B.R. 345, 390-92 (Bankr.S.D.N.Y. Mar.24, 2005).

cable subscribers), and that the Government not only would permit this, but wanted this—even though Adelphia was opposed to it.

On February 28, 2005, Adelphia CEO William Schleyer and Lead Director Anthony Kronman, the former Dean of the Yale Law School, met with David Kelley, the United States Attorney for the Southern District of New York, to see if their personal involvement could help bridge the gap between Adelphia's third offer and the Government's $725 million demand. Mr. Schleyer and Dean Kronman once more tried to make the points that Adelphia's lawyers had made before, but Mr. Kelley was not moved by those arguments. He stated that the Government believed it would win any forfeiture litigation, and was prepared to face whatever risks might exist regardless—including the risk that whatever assets the Government might take would be worth much less in its hands than in the hands of a cable operator. Dean Kronman also made the point that Adelphia's creditors make here—that providing value to shareholder victims would be inconsistent with the "absolute priority rule" in bankruptcy. Mr. Kelley was once more unmoved, observing that Adelphia's creditors knew or should have known, at the time of their investments, that the absolute priority rule could be trumped by the Government's power to seek restitution for victims.

At some point at about this time, the Government signaled that it would alternatively take $695 million if all of that was in cash, but Adelphia properly reasoned that this would be much less attractive for its estate than a settlement that provided the Government with as much of its value as possible in stock, interests in a litigation trust, or another alternative currency.

Given the circumstances with which it was faced, Adelphia's Board authorized acceptance of the Gov-

ernment's $725 million counteroffer. Because the Rigases were permitted by the Government to keep two of their cable companies, Bucktail Broadcasting Corp ("Bucktail Broadcasting") and Coudersport Television Cable Co. ("Coudersport Cable"), Adelphia was ultimately successful in reducing the settlement amount somewhat more, down to $715 million, provided that a portion of the payment was paid in cash. Thus Adelphia agreed to pay $715 million, consisting of: (a) in the event of a standalone emergence, $600 million of common stock and $115 million of interests in the litigation trust; or (b) in the event of a sale, (i) $400 million of common stock of Adelphia's successor, (ii) $115 million of an interest in the litigation trust, and (iii) $200 million in cash (provided the Debtors are sold on terms that include more than $10 billion in cash). A condition of this payment is that Adelphia obtain full and clear title to all of the Managed Entities other than the two the Rigases were allowed to keep, Bucktail Broadcasting and Coudersport Cable.

In approving the settlement the Board itself had the experience of months of discussions and consideration of settlement issues and was abundantly aware of two overarching facts:

> (a) the Government's hard-nosed negotiation position that Adelphia make a substantial payment (initially $1 billion, and later no less than $695 million (in cash)) in order to resolve the government claims; and
>
> (b) the Government's escalating threats that if a resolution was not reached on terms satisfactory to the Government, the Debtors or the Managed Entities (or both) would be indicted, and/or the Managed Entities would be forfeited (in which case

Adelphia would be required to pay the difference in value that any such forfeiture may cause).

The Board reached its decision without further input from the Creditors' Committee, having been told by the Government that if Adelphia informed the Creditors' Committee of the proposed settlement terms, the settlement would be taken off the table, and the Government would take action adverse to the Company. Rather, the Government said, creditor inquiries should be referred to the Government, and Adelphia's Board was advised that, despite several requests from Adelphia that it do so, the Creditors' Committee had not contacted the Government. Adelphia's management and outside counsel decided not to defy the Government on this point, even though they were uncomfortable proceeding with such a significant decision without directly updating and discussing the issues with Adelphia's committees in advance.

The $715 million in value that Adelphia has agreed to contribute to a victim restitution fund is a substantial financial obligation and exceeds the amount that Adelphia initially hoped would be acceptable to the Government based on existing precedents. But Adelphia's professionals—highly skilled professionals—advised that a lesser negotiated number was not achievable. Having reviewed all of the evidence, I am not in a position to quarrel with that view. It is plain to me that Adelphia's lawyers (and others on the negotiating team) put into the negotiations all of the skill, and effort, that any stakeholder, or judge, could reasonably expect. They did an excellent job. Given the enormous pressures, and risks, faced by Adelphia, its settlement on these terms was, at the least, reasonable.

Under all of the circumstances, I find the settlement in the best interests of the estate, and fair and equitable.

E. Settlement Specifics

The Settlement Agreements are in three parts and are composed of three separate but interdependent agreements:

(1) The DoJ-Adelphia Agreement;

(2) The SEC-Adelphia Agreement; and

(3) The Rigas-Adelphia Agreement.

The terms are complex. More detailed terms are in the motion, and, of course, the underlying agreements. The most important terms, from my perspective, are as follows:

(1) Forfeited Managed Entities and Real Estate

The Rigas Family will forfeit to the Government their direct and indirect interests in all of the Managed Entities except Bucktail Broadcasting and Coudersport Cable. They will also forfeit various real estate properties and all securities in ACC. The Government will transfer to the Debtors, free and clear of all liens and encumbrances, the forfeited assets (other than certain forfeited real estate not related to the Debtors' cable operations).

(2) Victim Restitution Fund

The Government will establish a restitution fund for the purpose of providing restitution to persons or entities who held publicly traded securities of the Debtors that, in the sole determination of the Government, were victims of the conduct alleged in the Indictment. Adelphia will contribute $715 million in value to the fund. This settlement payment is conditioned upon Adelphia receiving full and clear title to the Forfeited Managed Entities,

various real estate properties and, at Adelphia's option, Adelphia securities owned by members of the Rigas Family. It will be comprised of the following:

(a) In the event of a standalone emergence of Adelphia from bankruptcy, Adelphia will contribute (i) $600 million of common stock of the reorganized Adelphia, and (ii) $115 million of an interest in the Trust, which interest will share a first priority with claims of unsatisfied senior creditors and will enjoy a liquidation preference entitling the holder to receive 50% of the initial net recoveries until up to $115 million has been distributed on account of such interest in the Trust. The common stock portion of this payment will be valued at the valuation fixed for such stock by this Court in connection with Adelphia's approved plan of reorganization.

(b) In the event of a sale of Adelphia or substantially all of its assets, Adelphia will contribute (i) up to $400 million of common stock of Adelphia's purchaser, (ii) $115 million of an interest in the Trust, which interest will share a first priority with claims of unsatisfied senior creditors and will enjoy a liquidation preference entitling the holder to receive 50% of the initial net recoveries until up to $115 million has been distributed on account of such interest in the Trust, and (iii) the balance consisting of not less than $200 million in cash. The cash portion of this payment is conditioned upon a sale of Adelphia or substantially all of its assets for an amount that includes at least $10 billion in cash. The substitution of cash for common stock, as provided for above, will be at Adelphia's sole option. The common stock portion of this payment will be valued at the valuation fixed for such stock by this

Court in connection with Adelphia's approved plan of reorganization.

Unless extended on consent of the Government, which consent will not be unreasonably withheld, Adelphia will make the above-referenced payments on or before the earlier of: (a) October 15, 2006; (b) 120 days after confirmation of a standalone plan of reorganization; or (c) seven days after the first distribution of stock or cash, as the case may be, to creditors under any plan of reorganization.

Pursuant to the Rigas-Government Agreement, the Rigas Family will have no right to assert a claim against or participate in the Restitution Fund. As a condition to receiving a distribution from the Restitution Fund, the Government will require any recipient, other than Adelphia, to release and discharge the Rigas Family (except for John and Timothy Rigas) from any and all actions, claims or liabilities of any nature whatsoever, and to dismiss any claim or litigation commenced by such recipient against the Rigas Family.

(3) The SEC Final Judgment

Adelphia will agree to the entry of a final judgment resolving the SEC's claims against ACC in its separate action *Securities and Exchange Commission v. Adelphia Communications Corp., et al.*, 02 Civ. 5776(PKC), pending before Judge Castel of the district court in this District. Pursuant to this final judgment, ACC will be permanently enjoined from violating various provisions of the federal securities laws.

Also pursuant to this final judgment, the SEC has agreed that if Adelphia makes that payment of $715 million in value to the victim restitution fund, Adelphia will

not be required to pay disgorgement or a civil money penalty to satisfy the SEC's claims.

(4) Rigas Legal Defense Costs and Indemnities

Adelphia will pay $11.5 million into a legal defense fund to pay the obligations to professionals retained by the Rigas Family. Adelphia intends to charge the Forfeited Managed Entities for this payment.

The Rigas Family and Peter Venetis, on the one hand, and Adelphia, on the other hand, will enter into mutual releases.

(5) Non-Prosecution and Continued Cooperation

The Government will not criminally prosecute: (1) Adelphia; (2) the subsidiaries listed in Adelphia's Form 10-K for fiscal year 2003; (3) subsequently-formed or acquired subsidiaries; and (4) any joint ventures in which the Debtors have or acquire a controlling interest for any crimes (except for criminal tax violations) related to Adelphia's participation in the conduct set forth in the Superseding Indictment against John, Timothy and Michael Rigas, and the SEC Complaint.

In connection with any matter relating to the Debtors' operations, finances and corporate governance between 1997 and emergence from bankruptcy, the Debtors:

(a) will truthfully and completely disclose all information about all matters about which the Government inquires;

(b) will fully cooperate with the Government and use their best efforts to provide information and testimony as requested by the Government; and

(c) will bring to the Government's attention all criminal conduct by or criminal investigations of

> Adelphia or its senior managerial employees which comes to the attention of Adelphia's Board or senior management.

The protections afforded by the non-prosecution agreement are expected to apply to any purchaser of all or substantially all of the assets of Adelphia (such as buyers Comcast and Time-Warner under the Sale Agreements), if the purchasers agree to cooperate with the Government in connection with its law enforcement needs.

Conclusions of Law

I.

Legal Standards

Fed. R. Bankr.P. 9019(a) provides:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.

The legal standard for determining the propriety of a bankruptcy settlement is whether the settlement is in the "best interests of the estate." *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 523 (S.D.N.Y.1993) (Leisure, J.) ("*Purofied Down Products*"). To determine that a settlement is in the best interests of the estate, the Supreme Court held in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) ("*TMT*"), that the settlement must be "fair and equitable." *Id.* at 424, 88 S.Ct. 1157. Such a finding is to be based on "the probabilities of ultimate success should the claim be litigated," and:

> [A]n educated estimate of the complexity, expense, and likely duration of . . . litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

Id. at 424-25, 88 S.Ct. 1157. *See also Purofied Down Products,* 150 B.R. at 523; *Official Comm. of Unsecured Creditors of Int'l Distrib. Ctrs., Inc. v. James Talcott, Inc. (In re Int'l Distrib. Ctrs., Inc.),* 103 B.R. 420, 422 (S.D.N.Y.1989) (Conboy, J.) ("*International Distribution Centers*") (determination as to whether proposed compromise is fair and equitable requires exercise of informed, independent judgment by court).

The settlement need not be the best that the debtor could have obtained. *See In re Penn Cent. Transp. Co.,* 596 F.2d 1102, 1114 (3d Cir.1979) ("*Penn Central*"); *accord International Distribution Centers,* 103 B.R. at 423 ("Indeed, a court may approve a settlement even if it believes that the Trustee ultimately would be successful.") (citations omitted). Rather, the settlement must fall "within the reasonable range of litigation possibilities." *Penn Central,* 596 F.2d at 1114. "[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.) (Friendly, J.), *cert. denied,* 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972) (construing *TMT* in context of settlement of derivative suit).

A bankruptcy court need not conduct an independent investigation into the reasonableness of the settlement but must only "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.1983) (internal quotation marks omitted).

It is not necessary for the court to conduct a "mini-trial" of the facts or the merits underlying the dispute. *Purofied Down Products*, 150 B.R. at 522; *International Distribution Centers*, 103 B.R. at 423. Rather, the court only need be apprised of those facts that are necessary to enable it to evaluate the settlement and to make a considered and independent judgment about the settlement. *See Purofied Down Products*, 150 B.R. at 522; *In re Energy Coop., Inc.*, 886 F.2d 921, 924-25 (7th Cir.1989). In doing so, the court is permitted to rely upon "opinions of the trustee, the parties, and their attorneys." *International Distribution Centers*, 103 B.R. at 423.

The decision whether to accept or reject a compromise lies within the sound discretion of the court. *See Purofied Down Products*, 150 B.R. at 522 ("A Bankruptcy Court's decision to approve a settlement should not be overturned unless its decision is manifestly erroneous and a 'clear abuse of discretion.' ").

II

The Texaco *Factors*

A.

In *In re Texaco Inc.*, 84 B.R. 893, 901 (Bankr.S.D.N.Y.1988), Judge Schwartzberg of this Court listed a number of factors to consider in approving a settlement. Drawing in part from class action litigation, he suggested that the Court consider:

(1) The balance between the likelihood of plaintiff's or defendants' success should the case go to trial vis a vis the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures;

(2) The prospect of complex and protracted litigation if the settlement is not approved;

(3) The proportion of the class members who do not object or who affirmatively support the proposed settlement;

(4) The competency and experience of counsel who support the settlement;

(5) The relative benefits to be received by individuals or groups within the class;

(6) The nature and breadth of releases to be obtained by the directors and officers as a result of the settlement; and

(7) The extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

See Texaco, 84 B.R. at 902.

B.

As is typical in motions where the exercise of a court's discretion is informed by multiple factors, here some of the *Texaco* factors have more relevance, and properly should have more weight, than others. I consider the *Texaco* factors as follows:

1. Benefits of Settlement v. Likely Rewards of Litigation

This factor—which tracks the first of the factors identified by the Supreme Court in *TMT, see* 390 U.S. at 424, 88 S.Ct. 1157 ("the probabilities of ultimate success should the claim be litigated")—is in my view the most important factor, and I weigh it accordingly.

Adelphia faces litigation risks of extraordinary magnitude. The Settlement Agreements provide the Debtors with certainty on issues that, if not resolved favorably, could have a devastating impact on the Debtors. In return for an agreement to provide the Government with $715 million in value for the creation of a restitution fund, the Settlement Agreements:

> (a) Eliminate a "real risk" of a criminal indictment of Adelphia that would have disastrous consequences to this reorganization.
>
> (b) Resolve more than $5 billion in disgorgement claims asserted by the SEC in a lawsuit against Adelphia arising from much of the same conduct for which John and Timothy Rigas already have been convicted.
>
> (c) Ensure that the Debtors' estates include hundreds of millions of dollars of value from the Forfeited Managed Entities, title to which otherwise might only be obtainable by winning hard fought litigation against the Rigases and defeating competing claims to these assets by, for example, the Government and creditors of the Rigas Family; and
>
> (d) Prevent a forced sale of the Forfeited Managed Entities that would destroy hundreds of millions of dollars in value that the Debtors otherwise likely would have to make up themselves.

In criminal cases, the conduct of an employee or other agent within the scope of the agent's employment, and for the benefit of the corporation, is often imputed to the corporation. Thus the Government could indict Adelphia for the imputed criminal conduct of Rigas Management, some of whom already have been convicted of substantial wrongdoing. Although Adelphia could assert certain defenses, courts differ on whether such defenses would be applicable. And the collateral consequences of an indictment likely would be disastrous for the Debtors and their stakeholders. Among other things:

(a) An indictment of the Debtors constitutes an "Event of Default" under their debtor in possession financing, providing the lenders with the right to require immediate repayment of the borrowings thereunder. Such acceleration would permit the lenders to terminate the agreement and declare all loans under the agreement immediately due and payable, which could force the Debtors either: (i) at best, to obtain a substitute facility, which likely would not be available given the indictment, or (ii) to liquidate their assets, destroying billions of dollars of value.

(b) In April 2005 Adelphia entered into sale agreements with Time Warner and Comcast pursuant to which they agreed to purchase substantially all of the Debtors' assets—a transaction that I was told is worth approximately $17.5 billion. With exceptions not material here, each of the Time-Warner and Comcast sale agreements requires, as a condition to the buyer's obligations to close, a settlement, dismissal or other resolution of the Government's claims, pursuant to which no portion of the assets or joint ventures to be transferred will

have any post-closing liability—including risk of criminal prosecution.

(c) An indictment also could result in the loss of critical cable franchises and licenses, which would materially impact the value of the Debtors' business through a loss of ability to do business.

(d) An indictment inevitably would discourage potential future creditors and business partners, making it difficult, if not impossible, for the Debtors to enter into asset sales or to obtain surety bonding needed to support important corporate activities such as franchise agreements or construction undertakings.

I consider these potential consequences—particularly the loss of postpetition financing and the failure to meet conditions for the Time-Warner and Comcast transactions—to be extraordinarily prejudicial to the interests of the stakeholders in these chapter 11 cases. Even if the probability of an indictment, and its occurrence, were quite small, the gravity of the consequences would nevertheless warrant extensive measures to forestall any such possibility.

Even in the absence of a sale, if the Debtors ultimately were able to emerge from bankruptcy on a standalone basis without resolving the Government's claims, (i) the pendency of an active case by the SEC could impact negatively the Debtors' ability to issue new securities and, thus, impact negatively the timing of emergence, and (ii) any securities issued in those circumstances could trade subject to a substantial discount for the risks arising from such uncertainties.

Further, if the Debtors were convicted, they would face the prospect of governmental fines or restitution. Pursuant to 18 U.S.C. §§ 3613(e) and (f), a bankruptcy

discharge does not affect a debtor's liability for criminal fines and restitution obligations. Such a fine could exceed $8.6 billion.

Similarly, if the Debtors were held responsible for the approximate loss in the market value of ACC's common stock, the Debtors could be ordered to pay restitution of $4.3 billion, which would not include the additional restitution that might be ordered to non-shareholder victims of the fraud.

And if the Debtors were indicted and convicted, the Government also could seek forfeiture of property that constitutes proceeds of a crime, or property traceable to the proceeds of a crime, *see* 18 U.S.C. § 981—possibly major portions of the Adelphia estate.

Then, Adelphia already is a defendant in a civil enforcement action brought by the SEC, and the SEC also has filed a proof of claim in the bankruptcy based on its lawsuit. Under the federal securities laws, the SEC is entitled to seek disgorgement as well as civil monetary penalties. Absent a settlement, the SEC staff has stated that, under a disgorgement theory, it intends to seek from the Debtors the approximately $5 billion to $6 billion in funds raised through public offerings during the period that the Debtors' financial statements contained material misrepresentations and omissions. By contrast, pursuant to the Settlement Agreements, the SEC has agreed to forego seeking any disgorgement or civil monetary penalties.

The elimination of any risk of liability to the SEC is an extremely significant benefit to the estate. First, absent a settlement, Adelphia has only a limited ability to defend against the SEC's liability case in the SEC Action. Adelphia does not contest the wrongdoing of the Rigas Family that the SEC alleges as the predicate of Adelphia's own liability. Thus, Adelphia could only pre-

vail in litigation if it could avoid liability as a corporate entity for the admitted acts of its top corporate officers.

Second, absent a settlement, the SEC's claim that it could be entitled to billions of dollars from Adelphia is a credible threat. Once it has been established that federal securities laws have been violated, a court has discretion to apply the equitable remedy of disgorgement to strip the wrongdoer of all profits collected through its securities violations. Although Adelphia could assert a variety of defenses to try to limit its liability, the SEC has a reasonable basis for its theory that the $5 billion to $6 billion of dollars raised by Adelphia in the public markets through fraud constitutes unjust enrichment subject to disgorgement. Moreover, in addition to the disgorgement amount, the SEC could seek and be entitled to civil monetary penalties equal to the amount of Adelphia's gross pecuniary gain as a result of its securities law violations. In effect, this could double the SEC's possible recovery.

Of course, the Creditors' Committee brought an adversary proceeding against the SEC to address these concerns, and points the Creditors' Committee made and would make in that adversary proceeding might well have merit. But the Creditors' Committee's ability to prevail in that adversary proceeding would be uncertain. At the least, the Creditors' Committee' action would be vigorously resisted, and likely would result in lengthy appeals, at least up to the Second Circuit. I am not in a position to predict the outcome of the Creditors' Committee's action against the SEC, but am in a position to say, and find, that it could go either way.

At this point, the Managed Entities are still owned by the Rigas Family. They are very valuable. In Adelphia's arms-length dealings with Time-Warner and Comcast, the Managed Entities were valued at $990 million ($967

million when Bucktail Broadcasting and Coudersport Cable are excluded), and the estate will suffer a corresponding reduction in the sale price under the Time-Warner and Comcast deals if the Debtors cannot deliver up the Managed Entities as part of the cable properties to be conveyed. The Settlement Agreements benefit the Debtors by insuring that the estates include the full value of these assets.

Of course it is true that the Debtors brought claims against the Rigases that, if successful, could result in the Debtors obtaining the right to all of the Managed Entities in litigation, either through a constructive trust, or by executing on these assets pursuant to a judgment. But that litigation, which I have seen first hand, has been hotly contested, and the Rigas Family has asserted (and in the absence of a settlement reasonably could be expected to continue to assert) numerous legal and factual defenses against the Debtors' claims. Based on the evidence I have seen to date (which I will grant is probably much less than all of the evidence I would ultimately see), I think there is quite a high probability that Adelphia would ultimately prevail on at least some of its claims, particularly the damage claims for waste and breach of fiduciary duty. But whether Adelphia could win quickly, such as on its motion for summary judgment, and on its constructive trust claim, which is simultaneously more important to prevail on and difficult to show, is a closer question. And Adelphia might well have to address the complexities of a situation where it might establish wrongful conduct on the part of John, Timothy, Michael, and even James Rigas, but might not be able to show it on the part of others who might have an interest in the Managed Entities. Thus there is a material risk that the Debtors could not obtain the right to 100% ownership of the Managed Entities through liti-

gation. And even a successful outcome in such litigation likely would take substantial time.

The Settlement Agreements eliminate these risks to Adelphia, along with the enormous costs of pursuing that litigation, which I discussed in my recent decision on the Rigases' funding motion. *See Adelphia*, 323 B.R. at 390-92. Under the Government-Adelphia Agreement, Adelphia's settlement payment is conditioned upon receiving full and clear title to the Forfeited Managed Entities from the Government.

Of course, the $715 million in value that Adelphia has agreed to contribute to a victim restitution fund is a substantial financial obligation. But I agree with Adelphia and the other settlement proponents that given the tremendous advantages of settling, the benefits of the Settlement Agreements far outweigh the discounted probability of achieving a similar outcome through litigation.

By itself, the complete resolution of Adelphia's issues with the Government provide enormous value to the estates that could justify a settlement payment by Adelphia of hundreds of millions of dollars pursuant to the standards of Bankruptcy Rule 9019. The settlements resolve the SEC's claims against the estates of over $5 billion, as well as eliminate the devastating risks of a criminal prosecution. It is far from certain that Adelphia ever could achieve the same, or a remotely similar, result through litigation. And even if Adelphia could ultimately defeat a criminal prosecution by the DoJ, the decision to indict alone would be devastating for the reasons explained above.

The Settlement Agreements, however, go beyond simply resolving Adelphia's issues with the Government and also are contingent upon a transfer of ownership of the Managed Entities to Adelphia. This ensures the Debtors'

estates hundreds of millions of dollars in value that might never otherwise be achieved, even through protracted litigation. It also ensures that Adelphia does not face the "double hit" of seeing the Managed Entities forfeited to the Government and then having to compensate the Government for the diminished value of these assets in a forced sale.

2. *Prospect Of Complex And Protracted Litigations If The Settlement Is Not Approved*

I consider this factor—which tracks the second of the *TMT* factors, *see* 390 U.S. at 424, 88 S.Ct. 1157 ("the complexity, expense, and likely duration of the litigation")—to be worthy of considerable weight as well.

Any litigation with the Government necessarily will be complex. Any criminal prosecution of Adelphia would entail a lengthy and complicated presentation of evidence; indeed, the criminal trial of John, Timothy and Michael Rigas took over four months. In the event of a conviction, the Government likely would pursue criminal forfeiture proceedings to extinguish Adelphia's claim to the Managed Entities, or worse, the assets of Adelphia itself—in either case a proceeding with additional, complex issues of law and fact. The SEC's civil action likewise would entail complex legal and factual issues with potentially enormous adverse consequences to Adelphia.

Because any potential actions or claims taken by the Government against the Debtors could destroy billions of dollars of value, the Debtors would necessarily have to pull out all the stops in their efforts to resist the Government's efforts. They would be involved in "bet the company" litigation.

Likewise, on the Adelphia-Rigases adversary proceeding front, I do not have current figures, and may never have learned with any degree of accuracy, how

much that litigation has cost Adelphia, or what its current monthly legal fees budget is. But based on the many proceedings in that litigation I have seen, and the papers I have had occasion to read, I can reasonably conclude that the fees have been enormous, and that they would likewise increase enormously with time.

3. Competency And Experience Of Counsel Who Support The Settlement

I give this factor—which along with the factors discussed below, is encompassed within the third of the factors identified in *TMT, see* 390 U.S. at 424, 88 S.Ct. 1157 ("all other factors relevant to a full and fair assessment of the wisdom of the compromise") considerable weight, though less than the first two factors.

The Debtors were advised by a group of outside counsel with preeminent experience in the relevant fields. I will not repeat my factual findings in this respect (see page 150 above) here. It is sufficient to say that Adelphia received first-rate advice. No objector argues, or could argue, to the contrary.

4. Proportion of "Class Members" Who Support or Do Not Object

I consider this factor, which plainly cuts against approval of the settlement, but give it only modest weight. This settlement is quite unpopular with unsecured creditors, because many of them acquired their claims after the fraud at Adelphia became known—which would not affect their rights in any way in this bankruptcy case, but likely would affect their rights to share in any victims restitution fund.[2] And they oppose

[2] I note that despite some argument I heard at the hearing implying to the contrary, this "numerosity" factor is the only area

it because equity holder victims could recover from the fund the Government establishes outside of the bankruptcy court, but creditors would have priority over equity holders with respect to assets remaining in the estate. The settlement is popular with the estate's common stock equity holders, for exactly the same reasons. And the banks are essentially neutral, because the settlement leaves the estate's claims against them for another day.

But in my view, the approval of a settlement cannot be regarded as a counting exercise. Rather, it must be considered in light of the *reasons* for any opposition, and the more fundamental factors—such as benefits of settlement, likely rewards of litigation, costs of litigation and downside risk—described above. That is particularly so in cases like this one where a debtor's board is the fiduciary for *all* parties in interest, who naturally have competing interests with respect to limited assets that are insufficient to satisfy everyone's needs and concerns. In such cases, where the settlement proponent is trying to maximize value for all, or to minimize risk for all, concerns of that character plainly trump the head count in support.

5. Relative Benefits Within the Class

I give this factor (which also cuts, somewhat, against approval of settlement) some weight, but only some weight, for the reasons described in connection with the numerosity discussion just above. In my view, it was preferable, and not just appropriate, for Adelphia's

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where the time creditors acquired their claims is relevant on this motion. It is fundamental, in bankruptcy cases, that an acquirer of a claim has no lesser rights than any other creditor.

Board to consider the good of the entire enterprise, as contrasted to the needs and concerns of any particular constituency, even a major one.

6. Nature and Breadth of Releases

I give this factor (however broadly or narrowly it is construed) no weight, as I regard it as inapplicable. The Adelphia Board members who considered the settlement were wholly disinterested, and the cross-releases Adelphia would exchange with the Rigases were not unduly broad under the circumstances.

7. Extent To Which The Settlement Is A Product Of Arms Length Bargaining

I give this factor moderate weight on the motion now before me, though I would give it much greater weight if I ever thought it had not been satisfied. The Debtors and the Government have been engaged in protracted negotiations for nearly a year. During this period, the Debtors and the Government met more than 10 times and had countless additional discussions about a possible settlement. The Debtors repeatedly tried to negotiate a lower settlement number with the Government and agreed to pay $715 million in value only after the Government rejected several prior lower settlement offers. And Adelphia's ultimate offer was only in the context of a global settlement that ensured that all but two of the Managed Entities would be transferred to the Debtors.

As I saw firsthand, the Debtors fought the Rigases with extraordinary vigor—even to the point of taking two of my decisions up on appeal, and securing a partial reversal of one of them. They also met on numerous occasions with counsel for the Rigases. Since prior to the inception of these cases, the Debtors tried, through nego-

tiation and litigation with the Rigas Family, to resolve the Managed Entities ownership issues. None of these efforts were successful prior to the entry into these agreements. The Settlement Agreements resolve these issues, after vigorous litigation and negotiation.

C.

For the foregoing reasons, I conclude, in the exercise of my discretion, and based upon my independent judgment, that the settlement is fair and equitable, and in the best interests of the estate. In its effort to protect the estate against consequences that could cost stakeholders billions of dollars, and doom not just a reorganization but the very future of the enterprise, it falls well within the range of reasonableness.

III.

The Objections

Notwithstanding the foregoing, the motion has elicited numerous objections, principally by unsecured creditors, and most extensively by the Creditors' Committee. To the extent I have not previously addressed them, I will discuss them in turn.

A.

General Objections

1. Too Much to the Government

Of course most of the stakeholders in this case—and, for that matter, the Court—would be happier if the

estate's exposure on the risks it faced could have been satisfied for less. But any settlement cannot be viewed in a vacuum. *See Texaco,* 84 B.R. at 901 ("The duty of a bankruptcy judge to reach an intelligent, objective and educated evaluation of settlements cannot be carried out absent factual background.") (internal quote marks omitted). Rather, any settlement must be evaluated in light of the strengths and weaknesses of the settling entity's case, and the downside risks in the event of an adverse outcome.

The objectors, or at least most of them, do not quarrel with the Board's business judgment given the threats the company faced, but say that the settlement arose from Government coercion—indeed, what one Board member described as a "shakedown." They argue that even if the Board could not be expected to stand up to the unfair pressure on Adelphia, I, as a reviewing court, should recognize the coercion and decline to approve the settlement for that reason. But fully understanding the frustration of stakeholders (and Board members, for that matter) in this regard, I think that the argument stretches the "coercion" concept too far. It is really a double entendre. Where coercion is unlawful—the stuff that makes RICO cases, for example—disapproval of any resulting settlement presumptively would be appropriate, and perhaps essential. But where the "coercion" results from differences in bargaining power, as a consequence of law or fact, or governmentally granted authority and discretion (such as the authority and discretion we grant to prosecutors, to achieve a common good), that is a wholly different kind of "coercion." As one of the banks' counsel aptly noted in argument on this motion, it is what we call "leverage."

The bargaining power with which Adelphia had to negotiate was hardly optimal, and the amount proposed

to be paid to the Government is reflective of that. But there is no rule of law, nor should there be one, that says that litigants with weaker negotiating positions cannot enter into settlements commensurate with their weaker positions; indeed, in many instances they will be the ones whose needs are best served by a settlement.

Then, the Creditors' Committee, along with most of the other objectors, argues, as a major predicate for its objection, that the DoJ was bluffing, and that it never would have really indicted Adelphia. This, unfortunately, cannot be proved or disproved, at least without inappropriate inquiry into internal governmental processes and plans. Any conclusion on my part that the DoJ would not have done what it threatened to do would be sheer speculation.

Would the DoJ have indicted Adelphia, with the threat to the recoveries for innocent stakeholders that such an indictment would have entailed? One would think not, but the DoJ had done exactly that to Arthur Andersen, with those exact consequences. It was at least prudent for Adelphia's Board to protect the entity under its stewardship from its destruction, and to avoid taking such a gamble. Though I would likely not condemn this or any other Board if it had made a different decision, based on a belief (if founded on appropriate due diligence) that the DoJ would not act irresponsibly, I do conclude, and expressly find, that premising a settlement on the avoidance of such draconian consequences was plainly reasonable, and well within the range of reasonableness for making a tactical judgment of this nature. Gauging downside risk is a critical aspect of the litigation (and settlement) process. When the consequences of a wrong decision are so huge, it is not unreasonable to hedge against them.

Likewise, the Creditors' Committee's argument that if the DoJ ever fairly considered the so-called "Thompson" factors, the DoJ would not indict, calls for the same kind of speculation. This is the exact point argued by Adelphia's negotiation team, without success. Once more, the Adelphia Board cannot be faulted for declining to bet the company on what would be little more than a guess as to the decision the DoJ would make. That is especially true since the "Thompson" factors are merely internal DoJ guidelines, and do not provide a private right of action, or a predicate for judicial review.

I am not in a position to condemn the Adelphia Board, or this settlement, based on what is in essence speculation as to what the DoJ would have done. That is what settlements are all about.

Listening to the arguments made by the Creditors' Committee and other objectors on this motion, I was struck by how so many of the points they made to me had likewise been made by Adelphia's negotiating team, in their own communications with the Government. And upon review of the PowerPoint slides the Adelphia team used, it plainly appears that the Adelphia team made those points to the Government with the same skill that the Creditors' Committee made those points to me. When all of the right negotiating arguments have been made, and made well, it gives rise to a compelling inference that the negotiators got the best deal obtainable, and, at the least, that their deal falls well within the range of reasonableness.

2. Too Little From the Rigases

The Creditors' Committee and other creditors likewise object to the fact that the Government let the Rigas keep part of their assets, and along with that, allowed them to have some remaining funds to defend themselves. My

reaction to that is simply a variant of the observations just noted. Allowing the Rigas to keep what they would keep was something that the Government wanted, and, indeed, that the Government paid for, reducing its settlement demand by $10 million to take into account the Rigases' rights to retain Bucktail Broadcasting and Coudersport Cable.

Moreover, any analysis of what the Rigases gave up, and could keep, requires consideration of the alternatives—recognizing the DoJ's ability to get the Rigases' assets by forfeiture, and the hurdles Adelphia faced in recovering the Rigases' assets before the DoJ, and/or with a priority over the DoJ. As previously noted, based on facts now known to me, I regard it as likely—strongly likely—that Adelphia would ultimately prevail over the Rigases on Adelphia's common law claims, especially those for breach of fiduciary duty. But whether Adelphia could prevail quickly, on summary judgment, and especially on its constructive trust claim, is much more debatable, by reason of the heavy burdens in this and every other Circuit to obtain victory on summary judgment; by reason of the demanding requirements for the imposition of a constructive trust; and because of the difficulty of securing summary judgment against *each* of the persons or entities who had an interest in the Forfeited Assets, and not just John, Timothy and even Michael and James Rigas. And success on Adelphia's part on the constructive trust claim would be of considerable importance, because if Adelphia merely secured a money judgment against the Rigases, that might well not trump the DoJ's property interest in forfeited property.

In short, given the limits on the collectibility of Rigas assets, and the burdens and delays that due process in lit-

igation sometimes entails, Adelphia did very well in securing as much from the Rigases as it did.

3. Too Little From the Banks

The Creditors' Committee, and many creditors, also complain of the fact that Adelphia did not fund the settlement out of the hide of the prepetition banks, especially those that were the lenders on Adelphia's co-borrowing facilities. I find that argument unpersuasive. It fails satisfactorily to recognize the entitlement of the banks, like any other litigant, to due process before their claims, security interests, or other property could be taken away. The Creditors' Committee, with Adelphia as a co-plaintiff, has a major adversary proceeding pending, on behalf of the estate, against the banks. And if the Creditors' Committee prevails, the banks will then be held fully accountable for any and all wrongful conduct for which any of them is responsible. But the banks have not been found to have acted wrongfully yet, if they ever will be, and it will be this Court, or a higher court, that makes that determination—not the Debtors, and not the Debtors' unsecured creditors. The structuring of this settlement was not the appropriate time, or manner, to do that.

4. Use of Victims' Fund

The next point, urged by the Creditors' Committee, all or substantially all of the other unsecured creditor objectors, and the Ad Hoc Committee of Senior Preferred Shareholders, is that the settlement should be disapproved because of the likelihood that the DoJ or SEC will make the victims restitution fund available, in major part, to victims who are equity security holders, or to investors of debt securities who, if they asserted claims

in these chapter 11 cases, would be subordinated under Bankruptcy Code section 510(b). The objectors likewise argue that the SEC would in essence be trying to recover a penalty, which is subordinate to normal unsecured claims under Bankruptcy Code section 726(a)(4).

I assume that the Government will indeed distribute the value as the unsecured creditors fear. I also assume that it is at least arguable that if we had a liquidation here, the SEC's claim would be subordinated as a penalty. But I do not find either of these grounds to be a satisfactory basis for disapproval of the settlement here.

I start with the assumption, not surprisingly, that the ability of equity security holders to share in assets of the Adelphia estate, under any plan of reorganization, would be subject to the Absolute Priority Rule, and that except to the extent creditors might otherwise agree, equity holders could not receive distributions under any plan until and unless more senior claims, such as those of unsecured creditors, were satisfied in full. I similarly start with the assumption that claims of one-time creditors arising out of their purchases or sales of Adelphia securities would have to be subordinated to the claims of existing creditors of the same class, as section 510(b) expressly provides.

But here equity holders and defrauded noteholders would not be sharing in assets of the estate under a plan, or in a chapter 7 liquidation. Rather, they would be sharing in a fund to be created and owned by the Government, sharing in assets the Government would be obtaining as a consequence of the totality of its bargaining power in this case—which bargaining power in turn derives from the DoJ's indictment power, the DoJ's forfeiture power, and the SEC's ability to bring an enforcement action and to file and recover on a proof of a claim.

Thus, while defrauded equity holders will plainly have to confront the Absolute Priority Rule and section 510(b) when trying to share in assets of the estate *in this Court*, what I am asked to approve here is twice removed from that scenario. Not only does this motion not involve a reorganization plan contemplating a distribution to equity; it does not even involve an objection to the SEC's claim, or the merits of the Creditors' Committee adversary proceeding, with its related subordination issues. Rather it is a 9019 motion, raising the fundamentally different issues, under the standards discussed at pages 158-159 above, as to whether controversies—one (but only one) of which is differences in views as to how the SEC's proof of claims would be dealt with at such time as its allowability and priority were litigated—should be compromised.

Whether the SEC's claim would have been allowed under these circumstances, and/or subordinated, is a matter of fair debate. The issue is one that bankruptcy judges, practitioners and scholars have discussed amongst themselves for some time, without a definitive answer. So far as I am aware, the issue is, for all practical purposes, one of first impression.

But while the issue of the allowability or subordination of the SEC claim, when and if litigated, is a close and difficult one, it is not the issue I have to determine here. And indeed, the very difficulty of the underlying issue makes the wholly different issue before me—whether a settlement of such a controversy is inappropriate or unlawful—a rather easy one. The real issue before me, of course, is whether the Government and the Debtors could settle a controversy as to which that close and difficult issue is an element, and the answer to that plainly is "yes." It is no different than the multitude of

other difficult issues that are settled in litigation all the time.

If there ever was any doubt as to that, it was resolved by the decision of Judge Gonzalez of this Court, dealing with the essentially identical issue, in *In re WorldCom,* Case No. 02-13533(AJG), ECF # 8125 (Bankr.S.D.N.Y. Aug. 6, 2003). There Judge Gonzalez approved a settlement involving this very issue, finding no need or occasion to decide the underlying question, but finding that the undecided nature of the issue itself was a factor warranting approval of the settlement. He observed in this connection:

> Finally, although it is argued that the ultimate distribution to securities holders as contemplated by the settlement is violative of the "absolute priority rule" and subject to subordination under section 510 of the bankruptcy code, and even if this were ultimately determined to be the correct legal interpretation from a bankruptcy standpoint, nonetheless, there are sufficient legal issues that must be addressed—including the identity of the claimant, the discretion afforded the SEC in its use of the penalty, and the overall impact of Sarbanes-Oxley, as well as other issues that may be raised in a litigation to subordinate the claim—which issues, when combined with the unsettled nature of the law in this area, furnish sufficient doubt as to the outcome of any such litigation.

Exh. A at 3-4. He further noted that this uncertainty supported WorldCom's position that the settlement was appropriate. *Id.* at 4. And he noted, in connection with that absolute priority rule dispute, the fundamental principle, noted above, that:

> In considering approval of a settlement, the Court is not required to resolve the underlying legal issues related to the settlement. Rather, the Court must canvas the issues and determine whether the settlement "falls below the lowest point in the range of reasonableness."

Id.

To the extent this motion is not identical to the one considered in *WorldCom*, the issue is even more plainly one appropriate for settlement. For here, as noted, the fund to be established by the Government—whose disposition, the Government might well legitimately say, is *its* business—will have been derived from a settlement emerging from the DoJ's indictment power and forfeiture power, along with the SEC's right to file and recover on a proof of a claim.

Likewise, while it is very possible that what the SEC might receive on its proof of claim would be deemed to be a penalty or forfeiture, it is also possible that what the SEC might receive would be deemed to be restitution or something else, making this aspect of the controversy no less a fair matter for debate. And to state the obvious, this is not a case under chapter 7, and will hopefully never be one. In chapter 11, by contrast, section 726(a)(4) arguments might be of limited usefulness. While it is true that chapter 11's "Best Interests of Creditors" rule, *see* Code section 1129(a)(7), would make the section 726(a)(4) status of any SEC claim relevant in a case under chapter 11 of the Code, it is also true that such would turn on a host of other factors incapable of prediction at this time—most notably the degree of acceptances of a reorganization plan by creditors, and the value to be distributed under any chapter 11 plan. And in chapter 11, the failure to satisfy the Best Interests of Creditors rule would merely result in the inability to

confirm a plan—not subordination or disallowance of the claim in question in the chapter 11 case.

As a result, the objections by unsecured creditors and preferred shareholders premised on the "penalty" argument are not quite as strong as they were asserted to be. *"Penalty" issues would present the same kind of gray* area for which settlement would be classically appropriate.

Here, as in *WorldCom*, I have canvassed the issues; have determined that the matter of SEC claim allowability and subordination is an exceedingly close question, which could easily go either way; have determined that the matter of SEC claim allowability is only one of several underpinnings for the settlement; and have determined that a settlement that avoided rolling the dice on the underlying issues hardly "falls below the lowest point in the range of reasonableness."

5. Prejudice to the Bank Litigation

The Creditors' Committee voiced a fear that this settlement could prejudice the estate in the presently pending adversary proceeding against the banks. This was a legitimate concern, and requires the addition of language in the approval order to ensure that such does not happen. Neither side's position in that controversy should be strengthened or weakened as a consequence of the settlement.

Adelphia, the Creditors' Committee and certain banks worked to agree upon protective language, now embodied in paragraph 9 of the proposed order, and unless there is unanimous agreement as to any alternative, I will utilize that language without change. I will not, however, issue an advisory opinion as to how I might construe paragraph 9 in the event of any future controversy with respect to it—especially when the circumstances that

might trigger such a controversy have not yet become known. *See, e.g., Bank of New York v. Adelphia Communications Corp. (In re Adelphia Communications Corp.)*, 307 B.R. 432 (Bankr.S.D.N.Y.2004) (declining to issue advisory opinion on meaning of bond indenture "X Clause"). Parties' rights to be heard before me in the event of any future controversy will be reserved.

B.

"Sub Rosa Plan"

Huff argues that the settlement amounts to a "sub rosa" plan. Huff argues, in substance, that "cornerstone issues" concerning the subordination of the SEC's claim and compliance with the absolute priority rule should be subject to the safeguards of confirmation, and that they should not be decided within the context of a motion to approve a settlement.

I cannot agree with the contention that this is a sub rosa plan—among other reasons, because I cannot agree with the premise. The settlement does not invoke the asserted "cornerstone issues," for the reasons described in Section III(A)(4) above. Rather, it is twice removed from them, as it involves only a settlement, and, indeed, one under which the resolution of the SEC claim is only a part. It is well established, of course, that compromises may be effected separately during reorganization proceedings or in the body of the reorganization plan itself. *See Texaco*, 84 B.R. at 901.

C.

Requiring Victims to Issue Releases

The Class Actions Plaintiffs and Huff object to provisions in the settlement agreements that require victims to provide certain Rigases (not John Rigas and Timothy Rigas) a release. They argue that this would undermine victims' ability to recover non-forfeited assets.

However, this is not an appropriate objection to the settlement, at least in this Court. The argument was presented to Judge Sand, and rejected by him, in the court where the argument should have been made. To the extent any such arguments were not presented to Judge Sand, or addressed by him, they should be raised in his court. The objections, which focus on the needs and concerns of victims and their right to share in the victims fund, should be heard in the court that will supervise the fund, and do not go to whether the settlement agreements are in the best interests of the estate.

D.

Burdens/Benefits Allocation Issues

Several groups of unsecured creditors—the Ad Hoc Committee of ACC Senior Noteholders, the Ad Hoc Committee of Arahova Noteholders, and the Ad Hoc Trade Claims Committee (who hold claims against entities at different levels in Adelphia's rather complex parent-subsidiary structure) voice concerns—in many respects, mirror images of each other—as to whether they would inappropriately be prejudiced by any payment on behalf of the estate. In the view of each, the burden of the settlement should be borne, in whole or in

material part, by creditors at other levels, or by creditors of different entities. The ACC Senior Noteholders go a step further, and argue that this settlement cannot be approved until the intercreditor disputes, which could also involve benefits of the settlement, along with burdens, are resolved.

Turning to the second issue first, which raises a threshold issue as to whether the settlement should be approved at all, I disagree with the ACC Senior Noteholders. For the reasons stated above, I believe that this settlement should be approved, and I will note expressly that I find it to be in the best interests of, and for the benefit of, *all* of the 220 or so debtors in Adelphia's jointly administered chapter 11 cases—all of which would be hugely prejudiced if either they or their affiliates were indicted, and all of whose assets would be subject to forfeiture in the event the controversies with the Government were not settled. While I recognize that the *magnitude* of the burdens, or benefits, from this settlement might appropriately vary from one to another of the 220 debtors, I have no doubt whatever that the settlement is advantageous for all, and I reject the notion that approval of the settlement should be denied or delayed for the resolution of these individual intercreditor disputes—especially given the importance to Adelphia of the prompt resolution of the issues underlying this settlement. *Cf. Nellis v. Shugrue*, 165 B.R. 115 (S.D.N.Y.1994) (Sotomayor, J., then a district judge) (affirming Chief Judge Lifland's approval of a settlement agreement even though it did not contain any distribution plan but left ultimate resolution of distribution issue to outside neutral party). That is particularly so since the consideration under this settlement would not actually be paid by Adelphia any time soon, and, indeed,

since the currency by which the settlement is paid would not be fixed until a materially later time.

However, I agree with those creditors when they say that the allocation of the burdens and benefits of the settlement—*e.g.*, the payment of the $715 million, and the allocation of the excess value deriving from the Managed Entities—should be done in a fashion that does not prejudice their rights in their respective intercreditor disputes. It is reasonable to expect that creditors at the different levels in the corporate chain will have different perceptions as to what is fair when it comes to the allocation of settlement burdens and benefits. Fairness requires that mechanisms be created to permit those issues to be resolved—consensually, if possible, but otherwise with due process.

All would agree, I think, that the rights of various creditor constituencies on these intercreditor disputes should not be prejudiced by the settlement approved today, and paragraph 9 of the proposed order does that quite capably. But the creditor groups have a legitimate need to get a determination on the allocation issues, if they cannot agree, and supplemental mechanisms need to be established to accomplish that. I am uncomfortable with the proposal made by the Debtors, in their reply papers, that this be left to the plan negotiation process. While I always welcome consensual agreement, I think the Debtors' proposal lacks the necessary mechanism for giving creditors their day in court on the allocation issues if agreement cannot be achieved.

Accordingly, I believe that such an opportunity for judicial resolution, if necessary, must be provided. But it need not be done on a lightning fast basis, and indeed should not be, as the issues are complex and they likely will be interwoven with other complex issues involving intercompany obligations. Also, none of the Debtors will

actually be writing out a check to the Government any time soon, and I thus think that concerns creditors articulated as to how any such payment would be accounted for prior to resolution of the allocation issues are illusory.

At this juncture, I will direct that stakeholders who wish to take a position on allocation issues caucus amongst themselves, together with professionals for the Debtors and the Creditors' Committee (who likely will not be antagonists on these issues, but who are likely to be helpful in the process) to establish a game plan for the resolution of the allocation issues. That game plan should include the creation of an escape valve litigation mechanism (to be handled as a contested matter) to resolve any disputes if necessary. The game plan should provide sufficient time to get these issues resolved before confirmation, and, if possible, before the finalization of any reorganization plan. I will leave it to the parties, in the first instance, to decide on the best way to move the process forward, but I will make myself available, as usual, for conference calls, chambers conferences, or more formal hearings if desired.

E.

Banks' Substitute Liens

Several prepetition banks filed responses or limited objections noting that they do not oppose the settlement as such, but that they wished to ensure that security interests they now have in the Managed Entities, which would be lost when the Managed Entities passed to Adelphia in "cleansed" condition—free and clear of liens—would be replaced with substitute liens to protect their collateral position. After caucusing with the banks,

the Debtors agreed to language in the proposed approval order that would meet the banks' concerns in this regard.

However, the Debtors' measures to meet the banks' concerns then triggered objections from others—particularly the Equity Committee, which otherwise supports the settlement. They argue that the banks thereby got more than that to which they were entitled, and that if the banks want to protect their liens, they should go before Judge Sand, in forfeiture ancillary proceedings, to do so.

I will not deprive the banks of the protections the Debtors agreed to, and will include the desired provisions in any approval order. In addition to having the liens they wish to protect, which are on partnership and similar ownership interests, the banks have guaranties from the underlying entities that would be claims on their underlying assets in any event, to which the ownership interests would be structurally subordinate. In other words, the ownership interests would have value only to the extent that the guaranty obligations had been satisfied anyway. Thus there would be minimal prejudice to other stakeholders in the case as a consequence of giving the banks the comfort they requested. And the concept underlying the substitute lien measures to protect the banks, which may be analogized to an "adequate protection," is not offensive to me.

F.

Asset Sale Ambiguities

Time-Warner and Comcast have provisions in their asset purchase agreements that give them comfort that the cable properties Time-Warner and Comcast will be buying would not be indicted or subject to forfeiture.

The Creditors' Committee has expressed a concern that even after approval of this settlement, Time-Warner and Comcast might have lingering doubts as to their protection in this regard, and that such might give them an unintended ability to be relieved of their contractual duties under their asset purchase agreements with Adelphia. This, the Creditors' Committee argues, could destroy the mutuality of obligation under the asset purchase agreements, and deprive Adelphia of one of the most important benefits of the settlement.

Though I have no reason to question Time-Warner's or Comcast's sincerity, I agree that preserving mutuality of obligation, and avoiding uncertainties and ambiguities down the road, is of the highest importance. Adelphia, the Creditors' Committee, Time-Warner, Comcast and the DoJ are to work cooperatively to ensure that upon approval of the settlement, Time-Warner and Comcast will have the comfort they need, and that Time-Warner and Comcast will then acknowledge that—and thus that Time-Warner and Comcast will give the Creditors Committee and Adelphia the comfort they need. I am flexible as to the mechanics. Any means that reasonably satisfies those needs and concerns will be satisfactory to me.

G.

Class Action Plaintiffs' Objections

Certain class action plaintiffs argue that the settlement is too favorable for Adelphia. In particular, they contend that forfeited Rigas assets will inappropriately wind up in Adelphia's hands, because Adelphia could not establish a superior claim to the Rigas assets in a forfeiture proceeding in the district court. Hence, they argue, the aspect of the settlement providing for the Managed Enti-

ties to pass to Adelphia is unlawful, as violative of the Justice for All Act.

However, I cannot disapprove the settlement on that basis. After review of the transcript of the proceedings before Judge Sand, I believe that Judge Sand ruled on this exact issue, after he explicitly asked counsel for the class action plaintiffs to articulate the bases for their contention that the settlement was unlawful, and no meaningful response was forthcoming. And to the extent that he did not rule on the matter, I believe that any concerns in this regard properly should be brought before Judge Sand, and not me. The stated objection by the class action plaintiffs urges not that the settlement is too expensive for Adelphia, but rather that it is too favorable. An objection of that character does not address the needs and concerns of the estate, nor does it involve any legally cognizable rights over which I have jurisdiction.

Accordingly, the class action plaintiffs' objection must be overruled.

H.

Cable Venture Objections

Century/ML Cable Venture, a joint venture of Adelphia's subsidiary Century Communications and of an affiliate of Merrill Lynch, does not oppose the settlement, but has filed a limited objection to ensure that it is not prejudiced in claims and plenary litigation it has with Highland Holdings, one of the Rigas Owned Entities that will be forfeited. But I am confident that either the Joint Venture would not be prejudiced at all by the forfeiture of Highland Holdings under this settlement, or would not be prejudiced in any material way.

The Cable Venture has asserted claims against Highland, but Highland is subject to forfeiture to the Government with or without Adelphia's consent, and the harsh truth, from the Cable Venture's perspective, is that any claims the Cable Venture has against Highland will be against a defendant who is judgment-proof. The Cable Venture's other concern, that Highland would proceed against the Cable Venture, and the Cable Venture could not assert setoffs against Highland, while theoretically possible, is unlikely to occur, and could easily be protected against. If the Government keeps Highland after the forfeiture, the Government is unlikely to continue Highland's litigation against the Cable Venture (particularly given the Government's first-hand knowledge of the Rigas conduct that would be imputed to Highland), and if Adelphia ultimately gets Highland after the forfeiture, Adelphia is likely to act similarly. And since any Cable Venture litigation will be before me in any event, I can put into place measures to ensure that Highland does not unfairly deprive the Cable Venture of setoff defenses to which it would otherwise be entitled.

Adelphia has provided clarifications to address the Cable Venture's other stated concerns, which I find to be satisfactory.

I.

Franchisors' Objections

Several local franchising authorities—communities in which Managed Entities do business—have not objected to the settlement as such, but wish to ensure that their regulatory rights with respect to the Managed Entities are not impaired. The Debtors have agreed to a stipulation under which the local franchising authorities' rights

will be preserved, and an agreement of that character is satisfactory to me.

J.

Other Objections

To the extent other objections have been made (such as the argument that the administration of insolvent companies or assets that once came from them should be performed by bankruptcy courts, and not the SEC), I find them unsupported by the facts, repetitive, or otherwise lacking in merit, and plainly immaterial to the approval of this settlement. All are rejected.

Conclusion

For the foregoing reasons, the settlement is approved. None of the settlement agreements need be changed in any way, but counsel for Adelphia is to amend its proposed approval order, in consultation with objectors, to fully address the additional protective provisions and reservations of rights that I have authorized and required in this decision, and to otherwise conform with this decision. In the event of a failure to secure unanimous consent to the form of the order (without prejudice, of course, to rights to appeal), Adelphia is authorized and directed to settle the order on no less than two business days' notice by fax or hand.

As I find that the required business need for a waiver has been shown, the order may provide for a waiver of the 10-day waiting period under Fed. R. Bankr.P. 6004(g).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Cases
Case No. 02-41729 (REG)
Jointly Administered

IN RE

ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Debtors.

ORDER APPROVING THREE RELATED AGREEMENTS BETWEEN THE DEBTORS AND THE SECURITIES AND EXCHANGE COMMISSION, THE DEBTORS AND THE DEPARTMENT OF JUSTICE, AND THE DEBTORS AND THE RIGAS FAMILY

Upon the motion dated April 28, 2005 (the "Motion") of the above captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order, pursuant to Bankruptcy Rule 9019 and sections 105 and 363 of the Bankruptcy Code, approving three related agreements between the Debtors and the Securities and Exchange Commission, the Debtors and the Department of Justice, and the Debtors and the Rigas Family; and the Court having reviewed the Motion and the objections to the Motion, and having heard and considered the state-

ments and evidence in support of and against the relief requested therein at a hearing before the Court (the "Hearing"); and the Court having determined that the bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and the relief requested in the Motion being in the best interests of the Debtors and their estates and creditors and supported by sound business reasons; and upon all of the proceedings had before the Court in and the full record of these cases; and this Court having issued its Bench Decision on Motion to Approve Settlement Agreements (the "Bench Decision") on May 20, 2005; and after due deliberation and sufficient cause appearing therefor, it is

FOUND AND DETERMINED THAT:[1]

A. The Court has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, dated July 19, 1984 (Ward, Acting C.J.). The relief requested in the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. Due and proper notice of the Motion was provided as set forth in the Motion, and no other or further notice need be provided.

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[1] This Order incorporates by reference the findings of fact and conclusions of law set forth in the Bench Decision. Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Fed. R Bankr. P. 7052.

C. As more fully set forth in the Bench Decision, the Settlement Agreements[2] are fair, equitable and appropriate.

D. The Debtors have demonstrated sound business justification for this Court authorizing the Settlement Agreements.

E. The Settlement Agreements are in the best interests of, and, provide a benefit to, each of the respective Debtors' estates, and should be approved.

F. Payments to be made in connection with the Settlement Agreements are (a) an actual and necessary cost and expense of preserving the Debtors' estates, within the meaning of section 503(b) of the Bankruptcy Code, (b) of benefit to the Debtors' estates, and (c) reasonable and appropriate.

G. The Debtors do not control or own a majority of the shares of Century/ML Cable Venture and Century/ML Cable Corporation (collectively, the "Joint Venture").

H. The entry of this Order is in the best interests of the Debtors and their estates, creditors and interest holders and all other parties in interest herein; and it is therefore

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is granted. All objections to the Motion, to the extent not resolved or disposed of by the provisions of this Order or the Bench Decision, are overruled.

2. The Settlement Agreements are approved.

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[2] Capitalized terms used and not otherwise defined herein have the meaning ascribed to them in the Motion.

3. In connection with the Settlement Agreements and the terms of the non-prosecution agreement set forth therein, the Debtors are hereby authorized to obtain ownership to the cable systems currently operated by the Forfeited Managed Entities, by either (a) obtaining title to the equity interests in the Forfeited Managed Entities, (b) obtaining title to the equity interests in the entities that own the equity interests in the Forfeited Managed Entities ("*Intermediate Holding Companies*"), (c) obtaining title to the assets comprising the cable systems currently held by the Forfeited Managed Entities, in which event the Debtors shall contribute such assets to one or more newly formed entities ("*Newcos*" and, together with the Forfeited Managed Entities and the Intermediate Holding Companies, the "*Subject Companies*"), or (d) a combination of the foregoing, provided that the Debtors shall not mix within a single Newco assets corresponding to pledgors under different Co-Borrowing Facilities.

4. Subject to obtaining the requisite consent ("*DIP Consent*") of the lenders under the Debtors' postpetition credit facility (the "*DIP Facility*") and owning the Subject Companies pursuant to and in accordance with the Settlement Agreements (or on such other terms as are acceptable to the Debtors in their sole discretion), the Debtors shall grant to, and, if applicable, shall cause the Subject Companies to grant to (a) the respective administrative agents of the Co-Borrowing Facilities for the benefit of the respective agents and lenders under the Co-Borrowing Facilities, effective as of the date that is immediately prior to the Forfeiture Date, a lien on the equity interests of the Subject Companies that are owned by the Debtors or another Subject Company (the "*Subject Companies Collateral*"), in each case, to secure allowed claims for indebtedness, obligations, and lia-

bilities under the respective Co-Borrowing Facilities (the "*Co-Borrowing Liens*"), it being agreed that (i) each administrative agent is only being granted a lien on the equity interests of a Subject Company to the extent that such administrative agent held a lien on the equity interests of such Subject Company prior to the Forfeiture Date (or, in the case of a Subject Company that is a Newco, to the extent that such administrative agent held a lien on the equity interests of the Forfeited Managed Entity whose assets and properties were transferred to such Newco) and (ii) subject to the foregoing, and the terms of paragraph 8 below, the liens on the Subject Companies Collateral granted pursuant to the terms hereof shall have the same validity, priority, value, scope, effect and, (except as otherwise provided in paragraphs 9 and 13 herein) immunity from avoidance, as such liens had immediately prior to the Forfeiture Date; and (b) Bank of Montreal, as administrative agent, of that certain Co-Borrowing Facility, dated September 28, 2001 (the "*Olympus Facility*"), for the benefit of the agents and lenders under the Olympus Facility, as further security for obligations owed by Coudersport and Bucktail thereunder, a lien (the "*Supplemental Liens*" and, together with the Co-Borrowing Liens, the "*Prepetition Liens*") on all assets and properties (other than equity interests, which are provided for in clause (a) immediately above, the "*Supplemental Collateral*") that are wholly owned by entities in the Olympus Borrower Group (as defined in the DIP Facility) and, as of June 25, 2002 (the "*Petition Date*"), were not subject to a valid, perfected and non-avoidable lien, *provided, however,* that the Supplemental Liens and any amounts realized by the agents and lenders under the Olympus Facility as a result of the granting of such Supplemental Liens shall (i) be subject to any valid lien perfected sub-

sequent to the Petition Date, (ii) have the same validity, priority, scope, effect and (except otherwise provided in paragraphs 9 and 13 herein) immunity from avoidance as the Co-Borrowing Liens under the Olympus Facility have with respect to Bucktail and Coudersport, (iii) be limited to the fair market value of Coudersport and Bucktail (as such value is determined by the Bankruptcy Court), (iv) in all cases, be subject to the terms and conditions set forth in paragraph 8 below, and (v) secure allowed claims for indebtedness, obligations and liabilities under the Olympus Facility.

5. In consideration of the grant of the Supplemental Liens on the Supplemental Collateral, the agents and lenders under the Olympus Facility shall, absent further order of this Court (following notice and a hearing) based solely upon a showing of materially changed circumstances adversely affecting the value of the Supplemental Liens, forbear from exercising any and all rights or remedies against Coudersport or Bucktail or the equity securities representing ownership of Coudersport or Bucktail, whether arising under the terms of the Olympus Facility, applicable law, or otherwise; *provided, however,* that in the event the agents and lenders under the Olympus Facility are subsequently authorized by this Court to exercise any rights or remedies against Coudersport and/or Bucktail and/or the equity securities representing ownership of Coudersport and/or Bucktail, as of the date of such Order, the Supplemental Liens shall automatically be deemed revoked and ineffective.

6. Subject to obtaining DIP Consent and subject to owning the Subject Companies pursuant to and in accordance with the Settlement Agreements (or on such other terms as are acceptable to the Debtors in their sole discretion), the Debtors are hereby authorized to cause each

Subject Company to, and each Subject Company is hereby authorized to, guarantee (or in the case of either a Newco that acquired the assets of a Forfeited Managed Entity that was a borrower under one or more of the Co-Borrowing Facilities prior to the Forfeiture Date or a Subject Company (other than a Newco) that was a borrower under one or more of the Co-Borrowing Facilities prior to the Petition Date, become obligated to pay) the indebtedness, obligations, and liabilities under the applicable Co-Borrowing Facility to the extent (and only to the extent) that such Subject Company provided a guarantee of, or was obligated to pay, the indebtedness, obligations, and liabilities under such Co-Borrowing Facility prior to the Forfeiture Date (and, in the case of a Subject Company that is a Newco, such Newco shall only provide a guarantee of, or become obligated to pay, the indebtedness, obligations, and liabilities under a Co-Borrowing Facility to the extent (and only to the extent) that the Forfeited Managed Entity whose assets and properties were transferred to such Newco provided such a guarantee, or was obligated to pay, prior to the Forfeiture Date). In the event that the equity interests in a Subject Company are held by a Debtor that is not a guarantor or a borrower under the Co-Borrowing Facility to which such Subject Company shall be a guarantor or a borrower (after giving effect to the terms of the immediately preceding sentence), then such Debtor is hereby authorized to guarantee the indebtedness, obligations, and liabilities under the Co-Borrowing Facility to which such Subject Company shall be a borrower or a guarantor (after giving effect to the terms of the immediately preceding sentence); *provided, however,* that the guarantee provided by any such Debtor shall be nonrecourse to such Debtor and shall be limited solely to the value, if any, of the equity interests of the Subject Com-

pany that are held by such Debtor (as determined by the Court) and, in the event that such Debtor holds the equity interests in multiple Subject Companies, the guarantee of the indebtedness, obligations, and liabilities under any such Co-Borrowing Facility provided by such Debtor pursuant to the terms hereof shall not include the value, if any, of the equity interests in any Subject Company that is not a guarantor or a borrower under such Co-Borrowing Facility (after giving effect to the terms of the immediately preceding sentence). The guarantees and obligations provided by the two immediately preceding sentences are referred to herein as the "*Prepetition Guarantees and Obligations.*" The ability of the agents and lenders under the Co-Borrowing Facilities to take any action or seek to enforce any right or remedy with respect to the Prepetition Guarantees and Obligations shall be subject to the terms and conditions set forth in paragraph 8 below.

7. All liens and claims authorized to be granted or given in accordance with paragraphs 4-6 above shall be deemed to have been granted or given prior to the commencement of a bankruptcy case, if any, of or involving the Subject Companies (the "*Subject Companies Petition Date*") or the Debtors (as to the Supplemental Liens and, if applicable, the Prepetition Guarantees and Obligations) and such claims shall not constitute an expense of administration in any such case under title 11 of the United States Code. The Prepetition Liens shall be automatically perfected, effective as of the Forfeiture Date, upon the later of the date of entry of this Order and the date that DIP Consent is obtained. In addition, the Debtors and the Subject Companies shall execute such documentation as the respective administrative agents of the Co-Borrowing Facilities shall reasonably request to evidence and perfect the Prepetition Liens and the

Prepetition Guarantees and Obligations, which documents shall be reasonably satisfactory in all respects to the Co-Lead Arrangers (as defined in the DIP Facility).

8. Notwithstanding anything herein to the contrary, the rights, claims and interests of the lenders and agents under the Co-Borrowing Facilities in respect of the Prepetition Liens, the Prepetition Guarantees and Obligations, the Subject Companies Collateral, the Supplemental Collateral or otherwise shall, in all cases, be subject and subordinate to any and all claims and rights of the agents and lenders under the DIP Facility, in each case, arising under the DIP Facility or the Cash Management Protocol, as amended, which was annexed as Schedule 3 to the Final Order (as defined in the DIP Facility), and the right of the lenders and agents under the Co-Borrowing Facilities to take any action in respect thereof shall be subject to the terms and conditions set forth in all Orders (including, without limitation, the Interim Order, the Final Order and the Extension Order (as each such capitalized term is defined in the DIP Facility)), which were previously entered by this Court in the Debtors' chapter 11 cases (the "*Cases*").

9. This Order and the implementation of the Settlement Agreements is without waiver of, and shall not prejudice or affect the rights, claims or defenses of any party (including any lender, agent, committee, stakeholder, debtor, or estate) in any manner, in law or equity with respect to: (a) any request for relief (which shall be commenced by the Debtors by motion initiating a contested matter) seeking to allocate between or among any or all of the Debtors (i) the financial cost to be borne under the Settlement Agreements and (ii) after giving effect to the liens and claims authorized and granted in decretal paragraphs 4, 6 and 12 herein in favor of the

administrative agents under the Co-Borrowing Facilities, the benefits of the Settlement Agreements (the "Allocation Motion" and the issues referenced in clause 9(a) above, the "Allocation Issues"); provided, however, the Debtors shall have the burden of showing that such allocation satisfies applicable legal principles, including, but not limited to, section 1129 of the Bankruptcy Code (to the extent applicable); provided, further, however, that nothing in this Order shall prejudice any rights of a party in interest to oppose such allocation or to propose a different allocation; provided, further, however, that no order entered with respect to the Allocation Motion shall render this Order interlocutory or in any way affect the finality of this Order, (b) in the absence of this Court's prior determination of the Allocation Issues, any provision of a plan of reorganization for or involving the Debtors that operates to allocate between or among any or all of the Debtors the costs and benefits referenced in clause 9(a)(i) and (ii) above; and (c) the prosecution or defense of any litigation against any of the agents and/or lenders under the Co-Borrowing Facilities (or their respective investment banking affiliates that are defendants in the Committee Litigation (as defined below)) pending in this Court, including the adversary proceeding captioned *Official Committee of Unsecured Creditors for Adelphia Communications Corporation, et al. vs. Bank of America, N.A. et al.*, Ad. Pro. No. 03-04942 (REG), including the proposed intervenor complaint filed by the Equity Committee, which was commenced on July 6, 2003 (the "*Committee Litigation*"), as to which the Settlement Agreements shall be neutral, and shall not operate to reduce, limit or increase damages recoverable therein; *provided, however,* that the parties to the Committee Litigation may claim the Debtors' $715 million contribution to a Government restitution

fund pursuant to the Settlement Agreements as evidence of damages or mitigation of damages, recoverable as a matter of law or equity; which shall in no way constitute an admission or acknowledgement with respect thereto by any of the defendants to the Committee Litigation; *provided, further, however,* that all such parties are forever estopped from seeking to void, avoid or recover transfers of consideration, entities or assets effectuated pursuant to or in contemplation of the Settlement Agreements on the basis that such transfers are fraudulent transfers pursuant to chapter 5, subchapter III, of the Bankruptcy Code; *provided, further, however,* that unless otherwise ordered by the Court in connection with a motion or objection prosecuted by any party in interest (in each case, over the Debtors' opposition) or a ruling in the Committee Litigation (any such order or ruling, a "Contrary Order"), the Debtors agree not to reserve, withhold or escrow plan distributions otherwise payable under a plan of reorganization to any holder of claims under the Pre-Petition Facilities (as such term is defined in the DIP Facility) by reason of the pendency of the Committee Litigation or based on any claim, cause of action or objection asserted by any party in interest on behalf of the Debtors' estates that is based substantially on the allegations set forth in the proposed complaint underlying the Committee Litigation (provided, that, any plan of reorganization proposed by the Debtors shall so reserve, withhold or escrow such plan distributions if required by a Contrary Order); and; *provided, further, however,* without limiting the generality of the foregoing, absent agreement of TCI California Holdings, LLC and TCI Adelphia Holdings, LLC or further order of this Court following notice and a hearing, the financial costs of the Settlement Agreements shall not be charged or allocated to Century-TCI California Communications,

L.P., Western NY Cablevision, L.P., Parnassos Communications, L.P. or any of their subsidiaries.

10. In accordance with the Bench Decision, the parties in interest who wish to take a position on the Allocation Issues shall caucus amongst themselves and professionals for the Debtors and the Creditors' Committee on an expeditious basis in order to determine a process for the prompt resolution, or (if necessary) a determination of any dispute by this Court, of the Allocation Issues. Subject to the provisions of decretal paragraphs 9 and 10 hereof, the Debtors shall be permitted to propose a non-binding resolution of the Allocation Issues in order to draft and file a proposed plan of reorganization and disclosure statement.

11. Notwithstanding anything contained in this Order to the contrary, upon obtaining the ownership interests in the Subject Companies, the Debtors need not establish an entitlement to, or demonstrate that they have satisfied the elements of, the doctrine of subrogation (whether arising under state or federal law) to maintain or establish ownership of the Subject Companies.

12. All proofs of claim timely filed by lenders or agents under the Co-Borrowing Facilities, solely in their capacity as such lenders or agents, or thereafter permitted to be filed by such parties (solely in their capacity as lenders or agents of such facilities), shall automatically be deemed to have been timely filed against the Subject Companies as of the Subject Companies Petition Date.

13. As of the Subject Companies Petition Date, all Orders previously entered by this Court in the Cases (including, without limitation, the Interim Order, the Final Order, the Extension Order, and all provisions

relating to the adequate protection of the lenders or agents under the Co-Borrowing Facilities contained therein (collectively, the "*DIP Orders*")), to the extent applicable and in a manner that is consistent with such Orders' stated purposes, shall be deemed to apply to the bankruptcy cases commenced by one or more of the Subject Companies, effective as of the date of the entry of such Order, as if the Subject Companies were Debtors referred to in said Orders; *provided, however,* that all rights, claims, requests for relief, defenses and causes of action of the parties to the Committee Litigation shall automatically be deemed to apply to the Subject Companies without regard to any procedural requirement or deadline established by the DIP Orders.

14. The Debtors are authorized and empowered to cancel or otherwise retire, upon and following the occurrence of the Forfeiture Date, at such time and in such manner as the Debtors determine in their sole discretion, the debt and/or equity securities issued by Adelphia that are included in the Forfeited Assets pursuant to the Settlement Agreements; *provided, however,* that any such cancellation of debt securities included in the Forfeited Assets (the "Forfeited Debt Securities") shall be without prejudice (a) to the right of any holder of senior indebtedness issued by Adelphia Communications Corporation to assert that such Forfeited Debt Securities be deemed to remain outstanding for purposes of enforcing the subordination provisions contained in any Forfeited Debt Securities in connection with any plan distributions that otherwise would be made on account of such securities, or (b) the rights, claims or defenses of any party in interest (including the Debtors) to object to any such request; and *provided further, however,* that any such cancellation of debt or equity securities included in the Forfeited Assets (the "Forfeited Securities") shall be without prej-

udice (x) to the right of any party in interest to assert that such Forfeited Securities be deemed to remain outstanding for purposes of any plan distributions that otherwise would be made on account of such securities, or (y) the rights, claims or defenses of any party in interest (including the Debtors) to object to any such request.

15. Notwithstanding anything herein to the contrary, this Order is without prejudice to, and shall not constitute a waiver of, either (i) the rights of the City of Carlsbad, California and the County of San Diego, California (collectively, the "LFAs"), if any, to approve any future transfer requests and/or franchise renewal proceedings related to franchise agreements with one or more of the Forfeited Managed Entities or their successors, including, but not limited to, the right, if any, to consider issues of noncompliance that presently exist and/or to assert the need to cure any existing noncompliance issues (each as contractually or otherwise permitted), or (ii) any of the Debtors' rights and defenses related to section (i) of this paragraph, including, but not limited to, the right to argue that pursuant to section 365(f) of the Bankruptcy Code or otherwise that a LFAs' consent is not required to transfer a franchise agreement.

16. The Joint Venture shall be excluded from the definition of "subsidiaries" as used in the Rigas/Adelphia Agreement or the DoJ/Adelphia Agreement. Except as they relate to any derivative claims of Adelphia, references in the Settlement Agreements to entities "asserting claims through or on behalf of Adelphia" shall exclude the Joint Venture.

17. The Debtors are authorized and empowered to take such steps, expend such sums of money, and do such other things as may be necessary to implement and

effectuate the terms and provisions of this Order and the Settlement Agreements.

18. Notwithstanding Bankruptcy Rule 6004(g), this Order shall not be stayed for ten (10) days after the entry hereof and shall be effective and enforceable immediately upon signature hereof.

19. In the event of any inconsistency between this Order and the Settlement Agreements, this Order shall govern.

20. This Court shall retain jurisdiction over any matters related to or arising from the implementation of this Order and the Settlement Agreements.

Dated: May 26, 2005

s/ Robert E. Gerber
HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-41729 (REG)
June 13, 2005

IN RE ADELPHIA COMMUNICATIONS CORP., *et al.*,

Debtors.

Willkie Farr & Gallagher LLP, by Marc Abrams, Esq. (argued), Paul V. Shalhoub, Esq., Brian E. O'Connor, Esq., Terence K. McLaughlin, Esq., Rachel C. Strickland, Esq., Morris J. Massel, Esq., Jamie M. Ketten, Esq., New York, NY, Boies, Schiller & Flexner LLP by Philip C. Korologos, Esq. (argued), George Carpinello, Esq., Eric Brenner, Esq., Armonk, NY, Covington & Burling by Alan Vinegrad, Esq., New York, NY, Foley & Lardner LLP, by Gregory S. Bruch, Esq., Washington, D.C., for Debtors and Debtors in Possession.

David N. Kelley, United States Attorney, by Richard D. Owens, Assistant United States Attorney, Christopher J. Clark, Assistant United States Attorney (argued), Judd C. Lawler, Assistant United States Attorney, New York, NY.

Dilworth Paxson LLP, by Lawrence G. McMichael, Esq. (argued), Martin J. Weis, Esq., Philadelphia, PA, Brown Raysman Millstein Felder & Steiner LLP, by Ger-

ard S. Catalanello, Esq., Shannon R. Wing, Esq., New York, NY, for the Rigases.

Kasowitz, Benson, Torres & Friedman LLP, by David M. Friedman, Esq. (argued), Adam L. Shiff, Esq., Jonathan E. Minsker, Esq., New York, NY, for the Official Committee of Unsecured Creditors.

Bragar Wexler Eagel & Morgenstern, P.C., by Peter D. Morgenstern, Esq. (argued), Gregory A. Blue, Esq., Eric B. Fisher, Esq., Andrew Buck, Esq., New York, NY, for the Official Committee of Equity Security Holders.

Hennigan, Bennett & Dorman LLP, by Bruce Bennett, Esq. (argued), James O. Johnston, Esq., Los Angeles, CA, by A. Brent Truitt, Esq., New York, NY, for the Ad Hoc Committee of ACC Senior Noteholders.

Seward & Kissel LLP, by Arlene R. Alves, Esq., New York, NY, for Law Debenture Trust Company of New York, as ACC Senior Notes Trustee.

Brown Rudnick Berlack Israels LLP, by Edward S. Weisfelner, Esq., New York, NY, by Steven D. Pohl, Esq. (argued), Boston, MA, for the Ad Hoc Adelphia Trade Claims Committee.

White & Case LLP, by J. Christopher Shore, Esq. (argued), Douglas P. Baumstein, Esq., New York, NY, by Thomas E. Lauria, Esq., John K. Cunningham, Esq., Gerard Uzzi, Esq., Miami, FL, for the Ad Hoc Committee of Arahova Noteholders.

Andrews Kurth LLP, by Peter S. Goodman, Esq. (argued), Justin R. Wyatt, Esq., New York, NY, by Hugh M. Ray, Esq., Houston, TX, for the Ad Hoc Committee of Senior Preferred Shareholders.

Fried Frank Harris Shriver & Jacobson LLP, by Gregg L. Weiner, Esq., Gary Kaplan, Esq. (argued), Craig M.

Price, Esq., New York, NY, for W.R. Huff Asset Management Co., L.L.C.

Sheppard Mullin Richter & Hampton LLP, by David McCarty, Esq., Los Angeles, CA, for U.S. Bank National Association, as Indenture Trustee in Respect of the Arahova Notes and the FrontierVision Notes.

Chapman and Cutler LLP, by James E. Spiotto, Esq., Ann Acker, Esq., Chicago, IL, for the Certain FrontierVision Noteholders.

Emmet, Marvin & Martin, LLP, by Edward P. Zujkowski, Esq., Martin Eisenberg, Esq., New York, NY, for The Bank of New York, as Indenture Trustee.

Haynes and Boone, LLP, by Judith Elkin, Esq., Glenn M. Kurtz, Esq., Karen M. Asner, Esq., New York, NY, by Thomas E. Kurth, Esq., Robin E. Phelan, Esq. (argued), Richard Anigian, Esq., Dallas, TX, for Bank of America, N.A.

Mayer, Brown, Rowe & Maw LLP, by J. Robert Stoll, Esq., Robert J. Ward, Esq., Kenneth E. Noble, Esq. (argued), New York, NY, for Bank of Montreal, as Administrative Agent for the Olympus Lenders.

Simpson Thacher & Bartlett LLP, by Peter Pantaleo, Esq. (argued), William T. Russell, Jr., Esq. (argued), New York, NY, for Wachovia Bank, N.A., as Administrative Agent for the UCA Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by Luc A. Despins, Esq., New York, NY, for Citibank, N.A., as Administrative Agent for the Century-TCI Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by James C. Tecce, Esq., New York, NY, for JPMorgan Chase Bank, as Administrative Agent for the FrontierVision Lenders.

Luskin, Stern & Eisler LLP, by Michael Luskin, Esq., Trevor Hoffmann, Esq., New York, NY, for The Bank of Nova Scotia.

Cleary Gottlieb Steen & Hamilton LLP, by Mitchell A. Lowenthal, Esq. (argued), New York, NY, for 13 Investment Banks.

Chadbourne & Parke LLP, by Andrew P. Brozman, Esq., New York, NY, for Credit Lyonnais New York Branch, Credit Lyonnais Securities (USA) Inc., and LCM I Limited Partnership.

Ballard Spahr Andrews & Ingersoll, LLP, by William Slaughter, Esq. (argued), Philadelphia, PA, for Comcast.

Morgan, Lewis & Bockius LLP, by Richard S. Toder, Esq. (argued), Neil E. Herman, Esq., New York, NY, for Century/ML Cable Venture.

Proskauer Rose LLP, by Bradley I. Ruskin, Esq. (argued), Jeffrey Levitan, Esq., Scott A. Eggers, Esq., Karen Coombs, Esq., New York, NY, for ML Media Partners, L.P.

Angel & Frankel, P.C., by Joshua J. Angel, Esq., Laurence May, Esq. (argued), John H. Drucker, Esq. (argued), Leonard H. Gerson, Esq., Kirby McInerney & Squire LLP, by Richard L. Stone, Esq., Mark A. Strauss, Esq., Abbey Gardy, LLP, by Arthur N. Abbey, Esq., Judith L. Spanier, Esq., Stephen T. Rodd, Esq., Richard B. Margolies, Esq., New York, NY, for Consolidated Class Action Plaintiffs.

Rutan & Tucker, LLP, by William M. Marticorena, Esq., Costa Mesa, CA, for the County of San Diego, California.

Miller & Van Eaton, LLP, by Kenneth A. Brunetti, Esq., San Francisco, CA, by William Malone, Esq., Washington, D.C., for the City of Carlsbad, California.

DECISION ON MOTION FOR RECONSIDERATION OF ORDER APPROVING SETTLEMENT AGREEMENTS

ROBERT E. GERBER, Bankruptcy Judge.

The Creditors' Committee, joined by certain unsecured creditors, moves, pursuant to Fed.R.Civ.P. 59 and 60(b), as made applicable to bankruptcy cases under Fed. R. Bankr.P. 9023 and 9024, for reconsideration of this Court's order approving the Debtors' settlement with the DoJ, SEC, and the Rigases, based on developments since this Court issued its May 20 decision. Reconsideration is granted, but the Court's earlier decision is adhered to.

I.

The parties debate, as a threshold matter, whether this Court has jurisdiction to consider the Creditors' Committee's motion, as the Creditors' Committee had already appealed from the order that is the subject of this motion. The Creditors' Committee contends that the Court does have jurisdiction, and the Court agrees. Here relief was sought under Bankruptcy Rule 9023 and 9024, within 10 days of the order that had been appealed from. Under such circumstances, this Court is comfortable that under Fed. R. Bankr.P. 8002(b), which was amended in 1994 to conform to 1993 amendments to Rule 4(a)(4) of

the Federal Rules of Appellate Procedure,[1] and caselaw determined after the 1993 amendments to FRAP 4(a)(4),[2] the Court does have jurisdiction.[3]

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[1] *See* Advisory Comm. Note to 1994 Amendment to Fed. R. Bankr.P. 8002 ("This rule as amended provides that a notice of appeal filed before the disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions . . . is, in effect, suspended until the motion is disposed of. . . .").

[2] *See Stone v. INS*, 514 U.S. 386, 396, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) ("[T]he filing of a Rule 59 motion to alter or amend a district court's judgment strips the appellate court of jurisdiction, whether the Federal Rule of Civil Procedure 59 motion is filed before *or after* the notice of appeal.") (emphasis added); *Jones v. O'Keefe*, 2000 WL 1804153 (S.D.N.Y. Dec.7, 2000) (Casey, J.) at *2 (court retained jurisdiction to decide a Rule 59(e) motion even though a notice of appeal from the same order had been filed the day before); *Woodard v. Hardenfelder*, 845 F.Supp. 960, 965 (E.D.N.Y.1994) (Glasser, J.) (noting change in FRAP 4(a)(4) to avoid trap for the unwary, and to provide that a notice of appeal filed before the filing of one of the specified motions—including Fed.R.Civ.P. 59 and 60—"is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.").

[3] Accordingly, the Court does not have to consider the possible alternative ground, applied in cases in the Second Circuit involving 60(b) motions made outside the 10-day window where FRAP 4(a)(4) and Fed. R. Bankr.P. 9002(b) would provide protection, that could also justify jurisdiction given the outcome of this determination—that the lower court has jurisdiction to *deny* a motion for reconsideration, even though it would need leave from the appellate court to *grant* it. *See Toliver v. County of Sullivan*, 957 F.2d 47 (2d Cir.1992); *Travelers Casualty & Surety Co. v. Crow & Sutton Assocs.*, 228 F.R.D. 125, 127 (N.D.N.Y.2005) (Sharpe, J.) ("[A] rule 60(b) motion can be made even though an appeal has been taken and is pending. . . . In the Second Circuit, a district court can either entertain and deny the rule 60(b) motion without the circuit court's per-

Then, though the Court has considerable doubt as to whether reconsideration is appropriate under Fed. R. Bankr.P. 9024 and Fed.R.Civ.P. 60(b), it may plausibly be argued that the May 31 issuance by the United States Supreme Court of its decision in *Arthur Andersen LLP v. United States,*[4] and statements by the DoJ in its June 3 argument before the Second Circuit—both after the issuance of this Courts May 20 decision—provide a reasonable basis for assertions that they give rise to a "change in the law or the facts" upon which this Court made its decision, which has been held under at least some of the law construing Fed. R. Bankr.P. 9023 and Fed.R.Civ.P. 59(a) to be a satisfactory basis for reconsideration.[5] The Court assumes, without deciding, that these contentions are sufficient to permit consideration of their merits.

II.

However, upon reexamining its decision in light of the matter the Creditors' Committee proffers, the Court sees nothing to cause it to conclude that it made a "clear error of law,"[6] or that there was a change in the controlling law, or that the facts have materially changed.

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mission, or grant a rule 60(b) motion after an appeal is taken . . . if the moving party obtains permission from the circuit court.") (internal quotation marks and citations omitted; quoting, *inter alia*, *Toliver*).

[4] 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) ("*Arthur Andersen* ").

[5] *See In re Midland Mechanical Contractors, Inc.*, 200 B.R. 453, 456 (Bankr.N.D.Ga.1996) (Drake, J.) (articulating the standard in that fashion).

[6] *See Tallo v. Gianopoulos*, 321 B.R. 23, 27 (E.D.N.Y.2005) (Sifton, J.).

Changes in the Controlling Law

Plainly there has been no change in the controlling law with respect to the standards to be applied by a bankruptcy court in determining whether or not to approve a settlement. Nor did the issuance of *Arthur Andersen* result in a material change—assuming there was any change at all—in the law that would have been taken into account by the Debtors in deciding whether or not to settle, or by the Court in deciding whether the Debtors' settlement was in the best interests of the estate.

While *Arthur Andersen* had not come down when this Court's May 20 decision approving the settlement was issued, this Court did not then rule as it did based on an expectation that Arthur Andersen's conviction would stand. Indeed, widely disseminated reports of the April oral argument at the Supreme Court had led this Court then to suspect that a reversal by the Supreme Court of Arthur Andersen's conviction was likely. This Court's May 20 decision was based not on the likelihood that Adelphia would be convicted if indicted, but rather on the damage that an indictment itself would inflict, even with a subsequent acquittal. Even an indictment would result in grave damage to the company, and (among many other things) material risk to Adelphia's now-pending sale to Time-Warner and Comcast, and risk the loss of DIP financing.[7]

Nor does language in *Arthur Andersen*—including, without limitation, on page 2134 of the slip opinion, to which the Creditors' Committee cites—require this Court to rule in a way different than it did. *Arthur Andersen* was in essence a case about defective jury

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[7] *See In re Adelphia Communications Corp.*, 327 B.R. 143, 160-61, 2005 WL 1212601 (Bankr.S.D.N.Y. May 20, 2005) ("*Decision*") at *15.

instructions[8]—most significantly, as to the requisite mens rea of the people who acted on the defendant company's behalf.[9] At this point there is little reason to believe, after the John and Timothy Rigas guilty verdicts, that the Government would have similar problems in that regard. *Arthur Andersen* does not speak to the fairness or unfairness of convicting a corporation based on the acts of the live people who are a company's agents. Nothing in *Arthur Andersen* takes away the Government's right to indict, or ability to convict, corporations in cases where the live people acting on those corporations' behalf act with the requisite mens rea—a matter that was deficient in *Arthur Andersen*, but that might not be deficient in another case.

Thus the Court is constrained to disagree with the Creditors' Committee's broad statement, citing to page 2134 of the slip opinion, that *Arthur Andersen* "makes clear that a company may not be convicted where the wrongdoing is not intentional and pervasive, and that the acts of a few cannot be imputed to a corporation that otherwise lacks criminal intent."[10] *Arthur Andersen* makes clear that wrongdoing must be intentional, but that is as far as it goes. The portion beyond that may be what the law already is, and may be what the law should be, but it is not what *Arthur Andersen* announced, on page 2134 or otherwise.

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[8] *See, e.g., Arthur Andersen* slip opinion at 2135 ("[T]he jury instructions here were flawed in important respects.").

[9] *See Arthur Anderson* slip opinion at 2134 (in two places). *See also id.* at 2134 ("Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].' ") (brackets in original); *id.* ("[T]he jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.").

[10] Motion at 8.

New Facts

Nor can the Court agree that the facts have materially changed since this Court's May 20 decision, by reason of statements by the Government at its June 3 argument before the Second Circuit.

With a significant caveat,[11] the Court is inclined to agree with the Creditors' Committee's suggestion that when addressing the Second Circuit, the Government acknowledged weaknesses as to its forfeiture claims that Government negotiators did not acknowledge when negotiating with Adelphia representatives. And given its statements to the Circuit, it is likely that when the Government stated to Adelphia's Dean Kronman and others on Adelphia's negotiating team, with little in the way of qualifications or reservations,[12] "we will prevail,"[13] the

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[11] The Court notes that caveat because the Government properly observes that the Creditors' Committee did not quote the highly relevant comments that Judge Sotomayor expressed at page 17 of the argument transcript, and did not quote the questions by Judge Sotomayor (at pages 43-44 of the transcript) to which the Government was responding when the Government was quoted at pages 44-46 of the transcript. And the Government's response, fairly read in full context, probably should be regarded as based in material part on its recognition of (1) the apparent strength of the banks' position with respect to their liens on the Rigas Family Entities, and (2) difficulties in securing forfeiture of the interests held by non-convicted Rigases in Rigas Family Entities—both of which would cause problems for the Government, but which would not necessarily ensure to Adelphia's benefit.

[12] The Court does note that the Government also stated that "we will stretch it out until the end of time if necessary," implying a recognition that the Government might not prevail in earlier stages of any litigation.

[13] *See* Motion at 7-8, n. 3.

Government was stating its likelihood of success with materially greater assurance than it privately believed.

But these points ultimately are immaterial. In approving the settlement, this Court did not rely on the Government's self-serving statements to Adelphia as to the Government's likelihood of success. Puffery as to the strength of one's litigation position in settlement negotiations is not unheard of, and those on the receiving end of others' litigation predictions tend not to automatically take them at face value. In approving the settlement, this Court did not assume that the Government necessarily would prevail in its forfeiture claims (nor did Adelphia or anyone else argue that this Court should), even with respect to forfeiture claims that might relate to property beneficially owned by soon to be sentenced John and Timothy Rigas. Rather, as stated in its decision, this Court found that there were *risks* that the Government might prevail;[14] there were *risks* as to Adelphia's ability to prevail on its own constructive trust claims, particularly with respect to interests in Rigas Family Entities held by persons other than John, Timothy, Michael and James Rigas (which Adelphia likely would need to do to

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[14] *See Decision* at 153, 2005 WL 1212601, at *7 (finding reasonable Board's conclusions, after having been informed that Adelphia had arguments it could make against forfeiture, that Adelphia's prospects of prevailing were uncertain at best, and that there was "a very real risk" that Adelphia's arguments would be unavailing); *id.* at 160, 2005 WL 1212601, at *14 (settlements would ensure that the Debtors' estates would include hundreds of millions of dollars of Forfeited Managed Entities, "title to which otherwise might only be obtainable by winning hard fought litigation against the Rigases and defeating competing claims to these assets by, for example, the Government and creditors of the Rigas Family").

trump Government forfeiture rights);[15] and *risks* as to Adelphia's ability to prevail on constructive trust claims quickly on summary judgment, as contrasted to prevailing only on damages claims, and only after an ultimate trial.[16] The assessments by Adelphia's Board, and by the Court, of the risks to Adelphia with respect to forfeiture trump the assessments by the Government (as articulated to anyone or as privately held) with respect to the potential outcome as to that issue.

Finally, but significantly, the risks with respect to the forfeiture of the Rigas Family entities were but one factor in the Court's consideration of the totality of factors considered by the Court in approving the settlement.

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[15] *See id.* at 162, 2005 WL 1212601, at *17 ("But whether Adelphia could win quickly, such as on its motion for summary judgment, and on its constructive trust claim, which is simultaneously more important to prevail on and difficult to show, is a closer question."); *id.* at 168, 2005 WL 1212601, at *22 ("And success on Adelphia's part on the constructive trust claim would be of considerable importance, because if Adelphia merely secured a money judgment against the Rigases, that might well not trump the DoJ's property interest in forfeited property."). *See also* n. 16 below.

[16] *See id.* at 168, 2005 WL 1212601, at *22 ("I regard it as likely—strongly likely—that Adelphia would ultimately prevail over the Rigases on Adelphia's common law claims, especially those for breach of fiduciary duty. But whether Adelphia could prevail quickly, on summary judgment, and especially on its constructive trust claim, is much more debatable, by reason of the heavy burdens in this and every other Circuit to obtain victory on summary judgment; by reason of the demanding requirements for the imposition of a constructive trust; and because of the difficulty of securing summary judgment against *each* of the persons or entities who had an interest in the Forfeited Assets, and not just John, Timothy and even Michael and James Rigas.") (emphasis in original).

They were neither the overriding factor nor the factor that tipped the scales in an otherwise close balance.

The decision is adhered to.

SO ORDERED.

Federal Rules of Bankruptcy Procedure, Rule 9019

Rule 9019. Compromise and Arbitration

(a) Compromise

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

(b) Authority to compromise or settle controversies within classes

After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(c) Arbitration

On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

11 U.S.C.A. § 507

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the fil-

ing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $10,950[1] for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the

[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $10,950[1]; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who

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[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

is engaged in operating a fish produce storage or processing facility—

but only to the extent of $5,400[1] for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $2,425[1] for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect

[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

in a prior case under this title during that 240-day period, plus 90 days.

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository

institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

11 U.S.C.A. § 510

§ 510. Subordination

(a) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under *section 502* on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

11 U.S.C.A. § 1129

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that

term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

> **(A)** the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> **(B)** the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

> **(b)(1)** Notwithstanding section 510(a) of this title, if all of the applicable requirements of sub-

section (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the

treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or

retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).